TRANSCRIPT OF RECORD.

578

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 89.

WILLIAM L. HUSE, JAMES L. HUSE, HORATIO G. LOOMIS, AND LUTHER LOOMIS, APPELLANTS,

vs.

JOSEPH O. GLOVER, MARTIN KINGMAN AND BENJAMIN F. SHAW.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED OCTOBER 5, 1886.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court rooms in the city of Chicago, in the district aforesaid, before the Hon. John M. Harlan, one of the justices of the Supreme Court of the United States, and the Hon. Thomas Drummond, judge of the United States circuit court for the seventh circuit, on Monday, the fifth day of March, in the adjourned March term of said court, in the year of our Lord one thousand eight hundred and eighty-three, and of our Independence the one hundred and seventh year.

WM. H. BRADLEY, *Clerk.*

WILLIAM L. HUSE, JAMES L. HUSE, HORATIO G. LOOMIS, and LUTHER LOOMIS
vs.
JOSEPH O. GLOVER, BENJAMIN F. SHAW, and MARTIN KINGMAN. } In Chancery.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the twenty-first day of July, A. D. 1881, came the complainants, by their solicitors, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, their bond for costs and bill of complaint in said entitled cause, which said bond and bill are respectively in the words and figures following, to wit:

2 *Bond for Costs.*

United States Circuit Court, Northern District of Illinois.

WILLIAM L. HUSE *et al. vs.* JOSEPH O. GLOVER *et al.*

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court, and in default of payment by the complainants of any costs ordered or adjudged to be paid by them I hereby agree and stipulate that execution may issue against my property for any costs taxed against *him.*

July 11, 1881.

G. S. ELDRIDGE.

Endorsed: Filed July 21, 1881. Wm. H. Bradley, clerk.

3 *Bill.*

In the Circuit Court of [the] United States in and for the Northern District aforesaid. In Chancery Sitting.

UNITED STATES OF AMERICA, *Northern District of Illinois,* } *ss:*

To the honorable judges of the circuit court of the United States for the northern district of Illinois:

William L. Huse and James L. Huse, of the city of St. Louis, and citizens of the State of Missouri; Horatio G. Loomis, of the city of

Chicago, and a citizen of the State of Illinois, and Luther Loomis, of Peru, Illinois, and a citizen of the State of Illinois, bring this their bill of complaint against Joseph O. Glover, Martin Kingman, and Benjamin F. Shaw, citizens of the State of Illinois, and who reside within the district aforesaid; and thereupon your orators complain and say that they comprise the firm of Huse, Loomis & Co., and are and have been since the organization of said firm, in the year A. D. 1864, largely engaged in cutting ice at Peru and at other points on the Illinois river, and in transporting the same upon said river and thence by the Mississippi river and other navigable streams to St. Louis, Missouri; Memphis, Tennessee; Natchez, Mississippi; Baton Rouge, Louisiana; Plaquemine, Louisiana; New Orleans,
4 Louisiana; Shreveport, Louisiana; Nashville, Tennessee; Evansville, Indiana; Paducah, Kentucky; Columbus, Kentucky, and other southern markets beyond the limits of the State of Illinois, and in connection therewith have pursued a general transportation business, and in the conduct of their business have during said time had in constant use from three to six steamboats and from 30 to 60 barges, varying somewhat each year, the tonnage or custom house measure of said boats and barges ranging from 125 tons to 1,000 tons each, all duly registered and licensed in accordance with the act of Congress in such cases made and provided; that prior to the construction of the lock and dam across the Illinois river at Henry, hereinafter mentioned, your orators were enabled to navigate the Illinois river without interruption, except such as were incident to the ordinary use of said river as a public highway in its natural state; that the construction of said lock and dam at Henry and the construction of another lock and dam across said river at Copperas Creek, as hereinafter set forth, have not been promotive of the interests of your orators in their said business, but, on the contrary, have been practical impediments to the free navigation of the Illinois river by your orators; that while it is true that an additional depth of water was created
5 by the construction of said locks and dams above the same, yet that fact was of no practical advantage to your orators in the navigation of said river by their said steamboats and barges, for the reason that when said steamboats and barges pass the locks on their way from Peru to St. Louis and other southern points they encounter below the locks the same stage of water which they would have encountered if the locks and dams had not been constructed; that a very large proportion of the shipments made by your orators each year since the construction of said locks and dams, as hereinafter set forth, were made during the early portion of the season of navigation, with the water in said river at a high stage, and when they could as readily pass over said dams without passing through said locks and when in many instances it would be impossible to pass through the locks, for the reason that the stage of water rendered it impracticable to do so.

Your orators further show unto your honors that the General Assembly of the State of Illinois, by an act approved February 28, 1867, entitled "An act to amend an act for canal and river improvements,"

provided for the appointment of three commissioners, known as canal commissioners, and fixed their term of service, and for the appropriation of the sum of $400,000 to be expended by said com-
6 missioners in the construction of a lock and dam across the Illinois river at Henry. (See laws of Ill., 1869, p. 60).

Your orators further show unto your honors that the General Assembly of the State of Illinois, by an act approved March 7, 1872, defined the powers and duties of the said canal commissioners relative to the Illinois and Michigan canal and the lock and dam at Henry and the improvement of the Little Wabash river. By section two of said act last mentioned it was provided "that the board of commissioners shall have the general control and management of the Illinois and Michigan canal, lock and dam in the Illinois river at Henry, and of the Little Wabash river improvement, and shall have power to make all necessary contracts and appoint and employ all necessary officers, agents, and employees therefor which may be necessary to enable the said commissioners efficiently to discharge the duties devolving upon them * * * and to fix the rate of tolls upon the Illinois and Michigan canal and the mode of collecting the same." By section 3 of said act it was provided that "the board of canal commissioners shall also have power to establish and collect reasonable rates of tolls for the passage and use of the said lock at Henry and the lock on the Little Wabash river, and to
7 prescribe and enforce reasonable rules and regulations for the passage and use of said locks by boats, provided that the use of said locks shall be free to the United States for the transportation of troops and munitions of war; and provided, further, that the rates of toll on through freights, including lockage at Henry, shall not be more than the rates heretofore charged on the Illinois and Michigan canal on through freights."

By section 4 of said act it was provided "that all tolls received for the use of said lock and river improvement not necessary to keep the same in repair and to pay the expense of the collection thereof shall be paid quarterly into the State treasury as a part of the general revenue of the State."

Your orators further show unto your honors that the General Assembly of the State of Illinois passed an act, approved March 27, 1874, in force July 1, 1874, entitled "An act to revise the law in relation to the Illinois and Michigan canal and for the improvement of the Illinois and Little Wabash rivers." And by section 8 of said last-mentioned act it was, among other things, provided in substance that said commissioners should have general control and management of the Illinois and Michigan canal, including its feeders, basins, and appurtenances and the property thereto belonging, and all locks and dams and other improvements of navigation of the
8 Illinois and Little Wabash rivers. * * *

First, to appoint a general superintendent, collector of tolls and such other officers and agents as may be necessary for the management of said canal, locks, dams, and other improvements.

Second, to prescribe reasonable rules and regulations in respect to all matters connected with the navigation and use of the said canal,

locks, and dams, and transportation on or through the same. * * *

Third, to establish and collect reasonable rates of tolls for the passage and use of said canal and said lock. * * *

Your orators further show unto your honors that after the passage of said first-mentioned act of February 25, 1869, canal commissioners were appointed by the Governor of the State of Illinois, who entered upon the discharge of their duties as such and proceeded to construct said dam and lock across the Illinois river at Henry, and completed the same during the early part of the year 1872; that the said lock and dam *was* so constructed as to wholly impede the navigation of the Illinois river by steamboats and such other vessels as were accustomed to navigate the same, except by the passage of such vessels through said lock (except during periods of extreme high water); that on or about the 7th day of March, 1872, the said canal commissioners, assuming to act in pursuance of the said first-mentioned act of 1869 and of the said act of March 7, 1872, and without any other authority of law whatever therefor, prescribed rates of tolls and charges for the passage of said lock and dam at Henry by steamboats and other vessels navigating said Illinois river, as follows: For lockage at Henry for freight-boats, three cents per ton, tonnage measurement; for lockage at Henry, steamboats, three cents per ton, tonnage measurement, and for lockage at Henry, ice-boats, one and one-half per cent. per ton, tonnage measurement, and whereby said commissioners, in pursuance of the assumed authority aforesaid, defined "through freight" to be that which was cleared from Henry to Chicago or Chicago to Henry, and that "local freight" should include all other freight, and in addition thereto imposed a charge of six cents per ton upon ice transported in vessels through said locks until the 6th day of May following, when the charges upon the tonnage measurement of the vessels was reduced to one and one-half cents per ton and the charges upon the cargoes of ice to three cents per ton, at which rates the same have remained until the year 1878, when the charge or toll upon the tonnage measurement of vessels was reduced to one cent per ton, tonnage measurement, ever since, and to the payment of which your orators, in the course of their said business, since the completion of said lock and dam at Henry in 1872, have been subjected, and have paid the same under compulsion and against their protest as to the validity thereof, and especially as to the validity of the toll or charge imposed upon their said vessels as a tonnage tax based upon the tonnage measurement thereof.

Your orators further show unto your honors that by an act of the General Assembly of the State of Illinois in force July 1, 1873, entitled "An act to authorize the board of canal commissioners to construct a dam and lock at or near Copperas Creek and to make an appropriation for such improvement," there was appropriated for such improvement the net proceeds derived from the Illinois and Michigan canal and the lock at Henry on the Illinois river until the expiration of the first fiscal quarter after the adjournment of the next regular session of the next General Assembly, to be expended by the canal commissioners in the construction of a lock and dam

across the Illinois river at or near Copperas Creek and necessary work in connection therewith, said lock to be not less than 350 feet in length and 75 feet in width, and by section two of said act it was made the duty of the State treasurer to invest the net earnings received by the State from the Illinois and Michigan canal and the lock at Henry on the Illinois river in United States or other interest-bearing bonds as may be designated by the Governor, which interest should be
11 added to the principal or reinvested as aforesaid until there should be in the hands of the said treasurer $100,000 of such funds, which funds shall be designated as the Illinois river improvement funds, and by section three of said act it was provided, in substance, that said commissioners, as soon as there should be in the hands of the State treasurer the sum of $100,000 of the Illinois river improvement fund, should be authorized to take efficient and proper measures for the commencement of the improvement named in this act, and should put such parts of them as they may deem proper under contract, and should have the management and care and superintendence thereof, and provided that the cost of said improvements when completed should not exceed the sum of $430,000; that in pursuance of said last-mentioned act the canal commissioners proceeded with the work of constructing another lock and a dam across the Illinois river, at Copperas creek; that the General Assembly of said State, by an act in force July 1, 1875, entitled "An act to make further appropriations for the completion of the Copperas Creek dam and lock on the Illinois river," after reciting, in substance, that the appropriations theretofore made were not sufficient to complete said lock and dam, it was provided by section one of said act last
12 mentioned that there be appropriated the net earnings of the Illinois and Michigan canal and said lock and dam at Henry during and until the first fiscal quarter after the adjournment of the next regular session of the General Assembly, and also the unexpended balance of the Illinois river improvement fund then in the treasury after the first fiscal quarter after the adjournment of the present General Assembly, or so much thereof as may be necessary to complete the lock and dam at Copperas creek, on the Illinois river, during the year A. D. 1875. And by section two of such act it was further provided, in substance, that the canal commissioners should pay into the State treasury the net earnings of the Illinois and Michigan canal and the lock on the Illinois river at Henry, which funds should be kept and denominated the Illinois river improvement funds. And by section three of said last-mentioned act it was provided, in substance, that said canal commissioners, as soon as said lock and dam should be completed, should make such uniform rates of toll as they should believe would best serve the public interests, and collect the same in the same manner as they superintend and collect toll from the lock at Henry on the Illinois river, which said last-mentioned lock and dam were constructed by said canal commissioners in pursuance of the said acts of the
13 General Assembly, and completed on or prior to the opening of navigation upon the Illinois river in the year 1877, and since which time your orators, in the course of their said business,

have, by the said canal commissioners, been required to pay tolls and tonnage charges for the passage of said lock and dam in accordance with the rates prescribed by said commissioners for the passage of said lock and dam at Henry, as hereinbefore stated, which said tolls and tonnage charges your orators have paid under compulsion and against their protest, for the reasons hereinbefore stated and set forth.

Your orators further show unto your honors that their business relations have extended from Peru, Illinois, aforesaid, almost exclusively to points beyond the limits of the State of Illinois, as hereinbefore set forth, and that their business was necessarily almost exclusively an interstate commerce; that from the construction of said lock and dam at Henry in 1872 to the spring of 1878 they so paid as tonnage duties or charges upon the tonnage measurement of their steamboats and other vessels to the said canal commissioners the sum of nearly $3,000.00, and during the same period of time for tolls imposed upon the cargoes of ice transported by them in ice barges towed by said steamboats about the sum of $5,000.00 for the passage of said lock at Henry; that since said last date your
14 orators have continued their shipments of ice down the Illinois river to the points above mentioned, and their average yearly shipments have since then continued to be quite as large, if not larger, than those made prior to said date, and upon which shipments have been exacted from them charges based upon the tonnage measurements of the vessels employed and upon the cargoes of ice contained in the ice barges used at the rates last hereinbefore stated; that in passing down the river such tolls and tonnage duties are exacted from your orators upon the passage of their steamboats and ice barges through the lock at Henry; that in passing up the river such tolls and tonnage duties are exacted from your orators upon the passage of their steamboats and ice barges through the lock at Copperas Creek, and upon the passage of their steamboats and ice barges through said lock up and down said river as aforesaid during the present season; and which occur at frequent intervals, like tonnage duties and tolls are exacted by the canal commissioners of the State of Illinois, so that the same has ever since the erection of said lock and dam at Henry been, and still is, exacted from your orators, who are, as aforesaid, still constantly engaged in the shipment and transportation of ice from Peru, Illinois, to the points above mentioned. Your orators further show unto your honors that neither said locks and dams in any manner
15 promote the interests of your orators or facilitate the navigation of said river by their steamboats and ice-barges so used in the course of their said business, but, on the contrary, they are practical obstructions to the free navigation of said river, and entail upon your orators large expenses annually to pass said locks with their steamboats and ice-barges, which said lock and dams require your orators to break up their fleets of ice-barges that the vessels may be passed through said locks, necessarily causing great delays and large expenses, and at many times detentions, which, in some instances, owing to the imperfect condition in which said

locks were constructed, and the obstructions to the entrance thereof continuing for several weeks at a time, and thus the tolls and tonnage duties imposed upon your orators are simply a tax upon the business of your orators without any compensatory advantages resulting to your orators from the construction of said locks and dams.

And your orators further show unto your honors that the General Assembly of the State of Illinois, by section 1 of an act in force July 1, 1874, entitled "An act to revise the law in relation to the Illinois and Michigan canal, and for the improvement of the Illinois and Little Wabash rivers," provided in substance that the canal commissioners should consist of three persons, to be appointed by the Governor, by and with the consent of the Senate, at a meeting of
16 the General Assembly in 1875, and every two years thereafter, and that they should hold their offices for two years and until their successors should be appointed and qualified; that by section 3 of said act it was provided, in substance, that "for all legal purposes the said commissioners shall be deemed officers of the State, and all suits should be prosecuted by them in the name of the canal commissioners, but that they should not be considered as a distinct corporation or be liable to be sued;" that by section 8 of said act, among other things, general control and management of the Illinois and Michigan canal and of all locks and dams and other improvements of the navigation of the Illinois and Little Wabash rivers was given to said commissioners, with the authority to appoint a general superintendent and others officers for the management of said canal, locks and dams, and other improvements, and authority to prescribe reasonable rules and regulations in respect to the navigation and use of the same, and to establish and collect reasonable rates of tolls for the passage of said canal and said locks, to which said act last mentioned reference is hereby particularly made, and which said act is still in force and unrepealed, and by which the Legislature have assumed to prohibit any person or persons from maintaining any suit against said board of canal commis-
17 sioners as a body corporate; that the constitution of the State of Illinois prohibits any suit being maintained against the State, and thus all redress for the grievances hereinbefore and hereinafter mentioned are by the laws of the State of Illinois denied to your orators.

And your orators further show unto your honors that in pursuance of the said act of the General Assembly the Governor of the State of Illinois, at the last session of the General Assembly of said State, by and with the advice and consent of the Senate of said State, appointed the said Joseph O. Glover, Martin Kingman, and Benjamin F. Shaw canal commissioners for the two years then next ensuing; that said parties last named were, at the time of their said appointment, acting as the canal commissioners of the State of Illinois in pursuance of a like appointment made by the Governor of said State during the next preceding session of the General Assembly of said State, and by virtue of their last appointment became their own successors in office, and are still exercising control over the Illinois and Michigan canal, and the Illinois river, and

the said locks and dams at Henry and Copperas Creek, and assume to exercise all the powers assumed to be conferred upon them by the General Assembly of said State, as hereinbefore set forth.

Your orators further show unto your honors that they are
18 advised and believe that the imposition of said tolls and tonnage duties by the said canal commissioners so imposed upon the cargoes of ice transported by your orators through said locks and upon the vessels engaged in the transportation thereof and contrary to the provisions of article 4 of the ordinance for the government of the territory of the United States northwest of the river Ohio of July 13, 1787, which provides that the navigable waters leading into the Mississippi and St. Lawrence and the carrying places between the same shall be common highways and forever free as well to the inhabitants of the said territory as to the citizens of the United States or those of any other States that may be admitted into the confederacy without any tax imposed or duty therefor; that after the passage of the act of Congress of April 18th, 1818, to enable the people of Illinois to form a constitution and State government, etc., upon the adoption of the first constitution of the State of Illinois by the people thereof, the people of said State in the preamble to said constitution expressly recognized the binding force and effect of the said ordinance of 1787, and which constitution your orators submit was adopted subject to all the restrictive provisions contained in said ordinance with respect to any interference by the State with the free navigation of the Illinois river as a public highway.

19 Your orators further show unto your honors that they are advised and believe that the imposition of said tolls or charges upon the tonnage measurement of the vessels navigating the Illinois river assumed to be made by the said canal commissioners in pursuance of said acts of the General Assembly of the State of Illinois is contrary to the second paragraph of section 10 of article 1 of the Constitution of the United States, which prohibits the imposing of any such duty of tonnage by any State without the consent of Congress.

Your orators further show unto your honors that they are advised and believe that the construction of said locks and dams upon the Illinois river at Henry and Copperas Creek, by which the navigation of said river by steamboats and other vessels is absolutely prevented except in periods of extremely high water unless such vessels pass through said locks, is contrary to the provisions of the act of Congress of May 17, 1796, which, among other things, declares in substance that all navigable rivers within the northwestern territory should be deemed and remain public highways.

Your orators further show unto your honors that the said canal commissioners, in pursuance of said acts of the General Assembly, appointed Martin Kingman treasurer thereof; that the tolls so collected at said locks and dams by the collectors at Henry and
20 Copperas Creek are paid to said Martin Kingman as such treasurer, and by him paid into the treasury of the State of Illinois, unless otherwise appropriated, in pursuance of said acts of

the General Assembly of said State; that said Kingman is now acting and has acted in the capacity of treasurer of the said board of canal commissioners for several years last past; that the collection of said tolls and other charges by the collectors at said locks at Henry and Copperas Creek have been made under the immediate directions and instructions of the said Joseph O. Glover, Martin Kingman, and Benjamin F. Shaw, they assuming to exact the same in pursuance of the authority aforesaid.

Your orators submit that the said parties last named have no legal authority under the Constitution and laws of the United States to so obstruct the free navigation of said river and to so impose upon and exact from your orators and others engaged in the business of navigating said river the tolls, tonnage duties, and charges so by them imposed upon the vessels and cargoes passing upon said river through said locks.

Inasmuch as your orators are remediless in the premises in and by the strict rules of the common law, and have no legal redress for the grievances hereinbefore set forth under the constitution and laws of the State of Illinois, and are only relievable in equity,
21 where matters of this kind are properly cognizable, your orators pray that the said Joseph O. Glover, Martin Kingman, and Benjamin F. Shaw may be made parties defendant to this your orators' bill of complaint, and that they, and each of them, their agents and servants and employees, and all persons acting under them in any subordinate capacity by virtue of any appointment made by the said parties as canal commissioners of the State of Illinois, or otherwise, may be restrained by the order and decree of this court from imposing and exacting from your orators any tolls, tonnage duties, or other charges for the right of passage by the steamboats, ice barges, and other vessels so used by your orators in the navigation of the Illinois river and in the transaction of their said business, as hereinbefore set forth, and that until the final hearing of this cause the said persons may be temporarily enjoined as aforesaid; that the usual writ of subpœna may be issued out of and under the seal of this honorable court, requiring the said Joseph O. Glover, Martin Kingman, and Benjamin F. Shaw to appear and answer this your orators' bill of complaint in accordance with the rules and practice of this court and the statute in such case made and provided, and that the ordinary writ of injunction may
22 issue in like manner restraining the said persons last named, their agents, servants, subordinates, and employees, from the exacting and collecting from your orators any tolls, tonnage duties, or other charges imposed upon the vessels and cargoes belonging to your orators passing down said river in the course of their said business, as hereinbefore set forth, or from in any manner interfering with the free and uninterrupted navigation of said river by your orators in the usual course of their said business, and for such other and further relief as may seem agreeable to equity and good conscience.

G. S. ELDRIDGE,
Solicitor and of Counsel for Compl'ts.

STATE OF ILLINOIS, } ss:
County of La Salle, }

Luther Loomis, one of the complainants in the foregoing bill named, being first duly sworn, on oath deposes and says that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters stated on information and belief, and as to those matters he believes it to be true.

LUTHER LOOMIS.

Subscribed and sworn to before me this 11th day of July, A. D. 1881.

[SEAL.] H. M. GALLAGHER,
Notary Public.

Endorsed: Filed July 21, 1881. W. H. Bradley, cl'k.

23 Afterwards, to wit, on the twenty-first day of October, A. D. 1881, came the defendants, by their solicitors, and filed in said clerk's office their demurrer to the bill of complaint in said entitled cause, which said demurrer is in the words and figures following, to wit:

Demurrer.

UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

In the Circuit Court Thereof. In Chancery.

WILLIAM L. HUSE
vs.
JOSEPH O. GLOVER, MARTIN KINGMAN, and BENJAMIN F. SHAW.

The joint and several demurrer of Joseph O. Glover, Martin Kingman, and Benjamin F. Shaw, the above-named defendants, to the bill of complaint of William L. Huse, the above-named complainant.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in said complainants' bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged, do demur to the said bill, and for cause of demurrer show that the said complainant has not in
24 and by his said bill made or stated such a case as doth or ought to entitle him to any discovery or relief, as is thereby sought and prayed for, from or against these defendants or either of them.

Wherefore, and for divers other good causes of demurrer appearing in the said bill, these defendants do demur thereto, and they pray the judgment of this honorable court whether they, or either of them, shall be compelled to make any further or other answer to the said bill. And they humbly pray to be hence dismissed, with their reasonable costs and charges in this behalf most wrongfully sustained.

LAWRENCE, CAMPBELL & LAWRENCE,
Solicitors for Def'ts.

STATE OF ILLINOIS, } ss:
Cook County, }

George C. Campbell, being first duly sworn, states on oath that he is one of the attorneys for defendants in the above-entitled cause, and that the foregoing demurrer of the said defendants is not interposed by them for purposes of delay, but that justice may be done.

GEO. C. CAMPBELL.

Subscribed and sworn to before me this 21st day of October, A. D. 1881.

[SEAL.] ALONZO A. ROWLEY,
Notary Public.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

GEO. C. CAMPBELL.

Endorsed: Filed Oct. 21, 1881. Wm. H. Bradley, clerk.

25 Afterwards, to wit, on the twenty-eighth day of June, in the adjourned May term of said court, A. D. 1882, in the record of the proceedings thereof in said entitled cause before Hon. John M. Harlan, one of the justices of the Supreme Court of the United States, is the following entry, to wit:

Order.

WILLIAM L. HUSE, JAMES L. HUSE, HORATIO G. LOOMIS, and LUTHER LOOMIS
vs.
JOSEPH O. GLOVER, MARTIN KINGMAN, and BENJAMIN F. SHAW. } In Chancery.

This cause now coming on to be heard upon the demurrer of the defendants in the above cause to the complainants' bill herein, now come the parties, by their solicitors, and, after hearing a part of the arguments of counsel, the hour of adjournment having arrived, further hearing herein is postponed until to-morrow morning.

Afterwards, to wit, on the twenty-ninth day of June, in the adjourned May term of said court, A. D. 1882, in the record of the proceedings thereof in said entitled cause before Hon. John M. Harlan, one of the justices of the Supreme Court of the United States, is the following entry, to wit:

26 *Order.*

WILLIAM L. HUSE *et al.*
vs.
JOSEPH O. GLOVER *et al.* } In Chancery.

This cause coming on again to be heard pursuant to the order of postponement entered herein on yesterday, and the arguments of counsel being now resumed and concluded, and the court not being sufficiently advised in the premises, takes the same under advisement.

Afterwards, to wit, on the fifth day of March, in the adjourned March term of said court, A. D. 1883, in the record of the proceedings thereof in said entitled cause before Hon. Thomas Drummond, circuit judge, is the following entry, to wit:

Decree.

WILLIAM L. HUSE, JAMES L. HUSE, HORATIO G. LOOMIS, and LUTHER LOOMIS *vs.* JOSEPH O. GLOVER, BENJAMIN F. SHAW, and MARTIN KINGMAN.	In Chancery.

The demurrer to the bill in this case having been heretofore argued before Mr. Justice Harlan and considered by him, and he having now filed his opinion in the case sustaining the demurrer,
27 and the complainants declining to amend their bill and standing by their demurrer herein, it is ordered by the court that the demurrer to the said bill be sustained, and that the bill be dismissed with costs against the complainants herein; and thereupon the said complainants pray an appeal to the Supreme Court of the United States, which is allowed upon their giving bond in the sum of five hundred dollars, to be approved by this court.

On the same day, to wit, on the fifth day of March, A. D. 1883, Justice Harlan filed his opinion in said entitled cause, which said opinion is in the words and figures following, to wit:

Opinion.

Circuit Court of the United States, Northern District of Illinois. In Equity.

HUSE, LOOMIS & CO., Complainants.

vs.

JOS. O. GLOVER, BENJ. F. SHAW, and MARTIN KINGMAN, Defendants.

HARLAN, *Circuit Justice:*

This is a suit in equity. The present hearing is upon demurrer to the bill.

The complainants, constituting the firm of Huse, Loomis & Co., are, and since 1864 (besides a general transportation business)
28 have been, largely engaged in cutting ice at Peru and other points on the Illinois river and in transporting the same on that river thence by the Mississippi and other navigable streams to markets in different States. In the conduct of their business they have employed from three to six steamboats and from thirty to sixty barges, all duly registered and licensed, in accordance with the laws of the United States.

The defendants are canal commissioners, appointed in pursuance of certain statutes of Illinois which provided, among other things, for the construction of locks and dams on Illinois river, at Henry and Copperas Creek. The former was completed in 1872 and the

latter in 1877, at an aggregate cost of about $854,739.42, the whole of which was paid by this State, except about the sum of $62,359, paid by the United States.

By the statutes referred to the commissioners were authorized to establish and collect reasonable tolls for the passage and use of the locks by boats. To that end a schedule was adopted, in accordance with which complainants have been required to pay and have paid, always under protest, tolls for the passage of the locks by their boats, such tolls being ascertained, as to amount, upon the basis of the tonnage measurement of the boats and their cargoes.

From the construction of the lock at Henry, in 1872, up to
29 the spring of 1872 complainants paid to the canal commissioners for the passage of that lock, in tolls or charges, nearly $3,000 upon the tonnage measurement of their boats and about $5,000 upon their cargoes of ice in ice-barges towed by such boats. Their average shipments each subsequent year have been quite as large, and upon such shipments tolls have been exacted and paid by them.

The prayer of the bill is that the defendants, their agents, servants, and employees, be restrained from imposing and exacting from complainants any tolls or other charges for the right of passage through said locks by their steamboats, ice-barges, and other vessels used in the transaction of their business on the Illinois river.

The substantial grounds upon which complainants proceed are, briefly stated, these: That the locks and dams so constructed by the State not only do not aid or promote their business, but are practical impediments in the way of its prosecution and to the free navigation of the Illinois river by their boats; that their construction and the imposition by the canal commissioners of tonnage duties, under the name of tolls, upon the boats and cargoes of complainants are in violation, first, of that part of the ordinance for the government of the Northwestern Territory which provides that the navigable waters leading into the Mississippi and St. Law-
30 rence, and the carrying places between the same, shall be common highways, and forever free as well to the inhabitants of said Territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor; second, of section 10, article 2, of the National Constitution, which prohibits any State, without the consent of Congress, from laying any duty of tonnage; and third, of sec. 8, art. 1, of the Constitution, which invests Congress with power to regulate commerce with foreign nations and among the several States and with the Indian tribes.

It seems to the court that most of the questions discussed by counsel are concluded—some directly, others substantially—by the adjudged cases:

In Wilson *vs.* The Black Bird Creek Marsh Co., 2 Peters, 245, the question was whether the Legislature of Delaware could, consistently with the National Constitution, authorize a dam to be constructed across Black Bird creek, in that State. That stream, although wholly within the limits of Delaware, was conceded to be a

public navigable highway, in which the tide ebbed and flowed, and was capable of being used, and theretofore had been used, by sloops and other vessels enrolled and licensed under the laws of the United States.

After stating that the value of the property on the banks of the creek was enhanced by excluding the water from the marsh; that the health of the inhabitants in the vicinity was thereby probably improved, and that measures calculated to effect such results were within the reserved power of the State so long as they did not come in collision with the powers of the General Government, the Court, speaking by Chief Justice Marshall, said: "But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it; but this abridgment, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of Delaware and its citizens of which this Court can take no cognizance."

The counsel for plaintiff in error insist that it comes in conflict with the power of the United States to regulate commerce with foreign nations and among the several States. If Congress had passed any act which bore upon the case—any act in execution of the power to regulate commerce, the object of which was to control State legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the Middle and Southern States—we should not feel much difficulty in saying that a State law coming in conflict with such act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several States—a power which has not been so exercised as to affect the question. We do not think that the act empowering the Black Bird Creek Marsh Company to place a dam across the creek can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject."

In Gilman *vs.* Philadelphia, 3 Wall., 713, the Supreme Court sustained the constitutional validity of an act of the Legislature of Pennsylvania which authorize the construction of a bridge across the Schuylkill, one of the navigable waters of the United States, although the effect of that structure was not only to seriously impair the value of wharf property above the contemplated bridge, but to prevent the navigation of the river by certain vessels theretofore accustomed to use such wharves. While recognizing to the fullest extent the power of Congress to control in the interest of commerce the navigable waters of the United States, so as to keep them free of all obstructions, whether interposed by the States or by private persons, the Supreme Court, affirming the doctrines of Cooley *vs.* Wardens, 12 How., 299, said that there were some subjects connected with commerce which called for uniform rules and national legislation, while others were best regulated by rules and provisions

33 suggested by the varying circumstances of localities, and to be enforced under the authority of the States so long as Congress did not act.

Speaking by Mr. Justice Swayne, the Court further said: "It must not be forgotten that bridges, which are connecting parts of turnpikes, streets, and railroads, are means of commercial transportation as well as navigable waters, and that the commerce which passes over a bridge may be much greater than would ever be transported on the water it obstructs. It is for the municipal power to weigh the considerations which belong to the subject and to decide which shall be preferred and how far either shall be made subservient to the other. The States have always exercised this power, and from the nature and objects of the two systems of government they must always continue to exercise it, subject, however, in all cases to the paramount authority of Congress whenever the power of the States shall be exerted within the sphere of the commercial power which belongs to the nation." The opinion in that case concludes with these words: "The river being wholly within her limits we cannot say that the State has exceeded the bounds of her authority. Until the dormant power of the Constitution is awakened and made effective by appropriate legislation the reserved power of the States is plenary, and its exercise in good faith cannot be made the subject of review by this Court."

34 In Railway Company *vs.* Fuller, 17 Wall., 569, in illustration of these doctrines, it was said: "When a stream navigable for the purposes of foreign or interstate commerce is obstructed by the authority of a State such exercise of authority may be valid until Congress shall see fit to intervene. The authority of Congress in such cases is paramount and absolute, and it may compel the abatement of the obstruction whenever it shall deem it proper to do so."

In Pound *vs.* Turk, 95 U. S., 462, the Supreme Court sustained the validity of a statute of Wisconsin which authorized the construction of a dam across a navigable river wholly within its limits. After referring to the fact that there were navigable streams in many of the States, whose greatest value in water carriage is as outlets to sawlogs, sawed lumber, coal, salt, &c., the Court, speaking by Mr. Justice Miller, said: "In order to develop their greatest utility in that regard it is often essential that such structures as dams, booms, piers, &c., should be used which are substantial obstructions to general navigation, and more or less so to rafts and barges; but to the Legislature of the State may be most appropriately conferred the authority to authorize these structures when their use will do more good than harm, and to impose such regulations and limitations in their construction and use as will best reconcile and accommodate the

35 interests of all concerned in the matter. And since the doctrine we have deduced from the cases recognizes the right of Congress to interfere and control the matter whenever it may deem it necessary to do so the exercise of this limited power may all the more safely be confided to the local legislatures."

In Transportation Co. *vs.* Chicago, 99 U. S., 635, the Court, through

Mr. Justice Strong, said: "It has long been held that navigable rivers wholly within a State are not outside of State jurisdiction so long as Congress does not interfere."

In addition to these decisions in the Supreme Court of the United States, reference is made to Heerman *vs.* Beef Slough, &c., 8 Biss., 334; U. S. *vs.* Beef Slough Man. Co., *Ib.*, 424, and U. S. *vs.* New Bedford Bridge, 1. W. & M., 401.

The doctrines of the adjudged cases sustain the authority of this State, there being no act of Congress forbidding it to construct locks and dams upon the Illinois river. Her avowed object in so doing was to improve the navigation of that river and effect a reduction of freights to the headwaters of Lake Michigan and to the Mississippi river. The mode and extent of such improvement in the absence of national legislation based upon the power of Congress to regulate commerce was for her determination. Her discretion in such matters is not to be controlled by the courts so long as Congress does not interfere. That locks and dams cause some delay to or in some degree affect the interests of those whose business on the
36 Illinois river does not absolutely require the use of such instrumentalities may be conceded. But if in the judgment of the State, which has jurisdiction over all persons and things within its limits except as restrained by the National Constitution, the system of locks and dams is more advantageous to the general public than the river in its natural condition, if she deems it important to improve the navigation of the Illinois river, although thereby certain classes engaged in commerce may be subjected to inconveniences which do not exist in the use of the river in its unimproved or natural condition, her determination in the premises is not to be questioned by any authority except Congress. Until the National Legislature interposes its paramount authority the State cannot be controlled by the judiciary as to the mode and extent of improving the navigable streams within her limits.

Nor do we perceive that the power of the State in this respect is in any degree affected by the ordinance of 1787, even if that ordinance, as to the matters now under consideration, be not superseded by the Constitution of the United States. Strader *vs.* Graham, 10 How., 94; Permoli *vs.* Municipality, &c., 3 *Ib.*, 589; Pollard's Lessee *vs.* Hagan, 3 *Ib.*, 224; Woodman *vs.* Kilburn, 1 Biss., 546; Columbus Ins. Co. *vs.* Curtenius, &c., 6 McLean, 209. Illinois entered
37 the Union upon terms of equality in all respects with the States which existed at the time the Constitution was formed. In the statute of Virginia authorizing the cession to the United States of the territory northwest of the Ohio river and in the deed of cession one of the conditions prescribed was that the States formed out of that territory should be admitted "members of the Federal Union, having the same rights of sovereignty, freedom, and independence as the other States." The ordinance itself provided for the admission of the new States "on an equal footing with the original States in all respects whatever," so that it seems to the court Illinois has as full power and jurisdiction over her navigable streams that Virginia has over the navigable streams within her limits; but if

her powers in that respect are in any degree affected or controlled as to their exercise by the ordinance of 1787 it is not perceived that the position of complainants can be maintained.

The recognition of the right of the State, when unrestrained by acts of Congress, to improve navigable streams within her borders in such manner and to such extent as to her seems conducive to the public interests is not, necessarily, inconsistent with the provisions of that ordinance. The declaration therein that the navigable streams leading into the Mississippi river shall be common highways and be forever free to the inhabitants of the territory
38 and to citizens of all the States was certainly not intended as an inhibition upon the improvement of such highways by the Federal Government or by the respective States formed out of the Northwest Territory. We cannot suppose that Virginia intended, when ceding this vast domain, to withhold from the future States to be erected therein that control of navigable streams which, upon the adoption of the Constitution, she would have over those within her own limits.

The utmost, perhaps, which can be claimed is that that provision was intended to secure the use of such navigable streams as highways upon terms of equality—that is, without discrimination against inhabitants of that Territory or citizens of any of the United States. The Illinois river is none the less a common highway because its navigability has been improved so as to meet the wants of the public in a larger degree than it was capable of doing in its natural state. It is still a common highway for use alike by all citizens of the United States, under regulations which do not seem to be inconsistent with the ordinance of 1787; besides, in the opinion of the court, the rights secured by the provisions of that ordinance, so far as it relates to navigable streams, are in substance secured by the Constitution of the United States. Consequently, if that which Illinois has done towards the improvement of the Illinois river be not forbidden by the National Constitution, it is not in con-
39 flict with the provisions of the ordinance of 1787.

The only remaining question which we deem it necessary to consider relates to the right of the State to charge tolls for the passage and use of these locks, such tolls being based upon the tonnage measurement of the boats and their cargoes.

It is contended by complainants that the exaction of these tolls is inconsistent with that clause of the Constitution which prohibits the States, without the consent of Congress, from laying any duty of tonnage. The court is of opinion that the right of the State to charge for the use of its locks may be placed upon the same ground upon which rests the authority of municipal corporations owning improved wharves upon the navigable waters of the United States to charge for the use of such wharves by vessels, even those licensed under the laws of the United States and engaged in commerce with foreign nations or among the several States. Municipal regulations of this character have been maintained even where the wharfage fees are measured by the tonnage of the vessel using the wharves. Such fees so measured are not deemed duties of tonnage within the

meaning of the Constitution, where they are exacted not for the mere privilege of landing at a wharf, but as fair and reasonable compensation for the use of additional facilities furnished
40 for those engaged in commerce. Packet Co. *vs.* St. Louis, 100 U. S., 429; Vicksburg *vs.* Tobin, *ib.*, 430; Packet Co. *vs.* Keokuk, 95 U. S., 80. So in reference to tolls for the use of locks constructed on a navigable stream lying wholly within a State. Although measured by the capacity of the vessel or the extent of the cargo, they are not necessarily tonnage duties which the States are prohibited from laying. They are not, within the meaning of the Constitution, duties upon the vessel or its cargoes, but compensation exacted for the use of improved commercial facilities. In this case it cannot be claimed that the charges exacted by the commissioner are disproportioned to the amount expended by the State in the construction of these locks and dams, or that they are in themselves unreasonable in amount. Referring to that clause in the ordinance of 1787 which prohibits any tax, impost, or duty upon the right to navigate the navigable waters therein described, Mr. Justice McLean, in Spooner *vs.* McConnell, 1 McLean, 337, said: "The provisions of the ordinance had reference to the navigable waters and the carrying places as they then were, and in that State they were to remain free, without tax, &c. But this does not prevent the Legislature from improving the navigation of rivers and the carrying places between them. Such improvements can in no sense be considered as repugnant to the ordinance, but in
41 promotion of its great object; and it would seem to be no violation of the compact if the Legislature should exact a toll, not for the navigation of the rivers in their natural state, but for the increased facilities established by the funds in the State."

It is unnecessary to extend this discussion. The court is of opinion, for the reasons given, that the State of Illinois has the same power to improve navigable waters within her limits that she possess over other highways; and where money has been expended in making improvements it is competent for the State to impose tolls for their use even where the stream is one to which the regulations of commerce may be extended. This statement of the rule is, however, subject always to the qualification that the action of the State touching navigable streams within her borders is subordinate to the paramount authority of the nation whenever and as it may be exercised under the power granted to Congress of regulating commerce with foreign nations and among the several States.

Let the demurrer be sustained, and, if the complainants do not wish to amend, an order may be rendered dismissing the bill, with costs to defendants.

Endorsed: Filed March 5, 1883. Wm. H. Bradley, clerk.

42 Afterwards, to wit, on the twenty-first day of April, A. D. 1883, there was filed in said clerk's office an appeal bond in said entitled cause, which said appeal bond is in the words and figures following, to wit:

Appeal Bond.

Know all men by these presents that we, Luther Loomis, as principal, and George S. Eldredge, as surety, are held and firmly bound unto Joseph O. Glover, Martin Kingman, and Benjamin F. Shaw in the penal sum of five hundred dollars, to be paid to the said Joseph O. Glover, Martin Kingman, and Benjamin F. Shaw, their executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 20th day of April, A. D. 1883.

Whereas lately at a term of the circuit court of the United States in and for the northern district of Illinois, held at Chicago, in a suit depending in said court, on the chancery side thereof, wherein the said William L. Huse, James L. Huse, Horatio G. Loomis, and Luther Loomis were complainants and the said Joseph O. Glover, Martin Kingman, and Benjamin F. Shaw were defendants, a decree was rendered sustaining the demurrer to the complainants'
43 bill of complaint and dismissing said bill therein, with costs against said complainants, and said complainants having prayed an appeal to the Supreme Court of the United States to review said proceedings in the Supreme Court of the United States, which was allowed by said circuit court of the United States in chancery sitting upon the execution of a sufficient bond to be duly approved:

Now, the condition of the above obligation is such that if the said William L. Huse, James L. Huse, Horatio G. Loomis, and Luther Loomis shall prosecute their said appeal with effect and answer all costs and damages if they shall fail to make good their appeal, then the above obligation to be void; else to remain in full force and virtue.

LUTHER LOOMIS. [SEAL.]
G. S. ELDREDGE. [SEAL.]

Approved April 20, A. D. 1883.

THOMAS DRUMMOND.

Endorsed: Filed April 21, 1883. Wm. H. Bradley, clerk.

44 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to [be] a true and complete transcript of the record of all the proceedings had in said court in said entitled cause, wherein William L. Huse *et al.* are the complainants and Joseph O. Glover *et al.* are the defendants, as the same appear from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed

the seal of said court, at my office in Chicago, in said district, this nineteenth day of May, A. D. 1883.

[Seal of Circuit Court U. S., Northern Dist. Illinois. 1855.]

WM. H. BRADLEY, *Clerk.*

[Endorsed:] $16.70 *dollars* paid for this transcript by Judge Eldredge, July 20, '83. W. H. Bradley, clerk.

45 *Error to the Circuit Court of the United States for the Northern District of Illinois.*

Supreme Court of the United States. October Term Thereof, A. D. 1883.

WILLIAM L. HUSE, JAMES L. HUSE, HORATIO G. LOOMIS, & LUTHER LOOMIS, Pl'ffs in Error,

vs.

JOSEPH O. GLOVER, BENJAMIN F. SHAW, & MARTIN KINGMAN, Def'ts in Error.

And now come the —, by G. S. Eldredge, their attorney, and say that in the record and proceedings aforesaid and in the rendition of the decree and judgment aforesaid there is manifest error in this, to wit, that the court below erred in sustaining the demurrer to the complainants' bill of complaint and dismissing the same, whereas a decree should have been rendered overruling said demurrer and granting the relief prayed for in complainants' bill.

46 Wherefore, for this and other errors in the record & proceedings aforesaid, the said decree & judgment of said circuit court should be in all things reversed, &c.

G. S. ELDREDGE,
Attorney for ——.

[Endorsed:] Supreme Court of the United States. William L. Huse *et al.*, pl'ffs in error, *vs.* Joseph O. Glover *et al.*, def'ts in error. Assignment of errors. G. S. Eldredge, att'y for pl'ffs in error.

Endorsed on cover: N. Illinois C. C. U. S. No. 89. William L. Huse, James L. Huse, Horatio G. Loomis, and Luther Loomis, appellants, *vs.* Joseph O. Glover, Martin Kingman, and Benjamin F. Shaw. Filed 5th October, 1883.

119-543

Office Supreme Court U. S.
FILED.
DEC 1 1886
JAMES H. McKENNEY,
Clerk

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1886.

No. 89.

WILLIAM L. HUSE et al.,
Appellants,
vs.
JOSEPH O. GLOVER et al.,
Appellees.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF ON PART OF APPELLANTS.

C. S. ELDREDGE,
For Appellants.

OTTAWA:
JOURNAL JOB AND LEGAL PRINTING HOUSE
1886.

IN THE

SUPREME COURT OF THE UNITED STATES.

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WILLIAM L. HUSE et al., Appellants,
vs.
JOSEPH O. GLOVER et al., Appellees.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

BRIEF ON PART OF APPELLANTS.

This case comes before the Court on appeal from the decision of the circuit court, overruling a demurrer to the complainants' (appellants') bill. The bill in this case alleges that the complainants since 1864 have been engaged in cutting ice at Peru, and other points on the Illinois river, and in transporting the same on that river and the Mississippi river and other navigable streams to St. Louis, Memphis, Baton-Rouge, New Orleans, Paducah and other points upon the Mississippi, Cumberland and Ohio rivers; and in connection therewith pursued a general transportation business, using constantly from three to six steamboats and thirty to sixty barges varying in tonnage from 125 tons to 1,000 tons each, duly registered and licensed. That prior to a construction of a

lock and dam across the Illinois river at Henry, they were enabled to navigate the river without interruption except such interruptions as were incident to the ordinary use of the river in its natural state. That the construction of the lock and dam at Henry, and of another lock and dam thereafter at Copperas Creek, were practical impediments to the free navigation of the river; that while the stage of water was increased by the construction of the dams above the same, yet when the complainants' vessels had passed the locks and dams, they, neccessarily, encountered the same stage of water below the dams that they would if the dams had not been constructed. [Record 1-2.]

By an act of the General Assembly of Illinois passed February, 28, 1867, the legislature assumed to enter upon a very elaborate system for the improvement of the navigation of the Illinois river. [Laws of Illinois, 1867 p. 81.] This act is simply alluded to, and has no material significance except as indicating the purpose of the act of February 28, 1869, amendatory thereof. [Laws of Illinois, 1869, p. 60.] Under section 2 of the act of 1869, it was provided "that the appropriation "made and provided for in said act,(viz: The act of 1867.) "shall be and the same is hereby limited to the sum of "$400,000." By section 5 it was provided that "said "commissioners shall not under any circumstances "or under any claim of right under any law, take or at-"tempt to take possession of or in any manner interfere "with the Illinois and Michigan Canal or the tolls or revenue thereof."

It will be observed that this act of 1869 gave no right to the canal commissioners to impose tolls or other charges for the passage of the lock at Henry.

By the Constitution of Illinois of 1870, being one of the "separate sections" entited "Canal," it is provided as follows:

"The General Assembly shall never loan the credit of "the State, or make appropriations from the treasury "thereof, in aid of railroads or canals; provided that any "*surplus earnings of any canal may be appropriated for "its enlargement or extension.*"

By the act of the General Assembly of Illinois of March 7th, '72, section 2, it was enacted that "the board of "canal commissioners shall have the general control and "management of the Illinois and Michigan Canal, the "lock and dam in the Illinois river at Henry, and of the "Little Wabash river improvement; * * * * and "shall have power to fix the rates of tolls upon the Illi- "nois and Michigan Canal and the mode of collecting the same."

By section 3 of the said act it was provided that "the "board of canal commissioners shall also have power "to establish and collect reasonable rates of tolls for the "passage and use of said lock at Henry and the lock on the "Little Wabash river, and to prescribe and enforce reason- "able rules and regulations for the passage and use of said "locks by boats, provided that the use of said locks shall "be free to the United States for the passage of troops and "munitions of war, and, provided further, that the rates of "toll on through freights, including the lockage of Henry, "shall not be more than the rates heretofore charged on "the Illinois and Michigan Canal on through freights."

Section 4 provides that "all tolls received for the use "of said locks of said river improvement, not necessary to

"keep the same in repair and to pay the expenses of the "collecting thereof, shall be paid quarterly *into the state "treasury as a part of the general revenue of the state.*" (Laws of Ills, 1872, p 213-214.)

It will be thus seen that the board of canal commissioners were invested with the full power to impose tolls for the passage of the lock and dam at Henry; and that the surplus tolls were required to be *paid into the state treasury* as a part of the *general revenue of the state.*

It perhaps may as well be remarked here, to arrive at a correct understanding of the question involved, that the Illinois and Michigan Canal extends from Chicago to the Illinois river, at La Salle, thus forming a connecting link between the waters of Lake Michigan and the river, by which canal-boats were enabled to pass from the one to the other through this artificial channel constructed by the state.

By the act of the General Assembly of Illinois of April 17, 1873, (laws of '73, p 6-7), after reciting that the improvement of the navigation of the river had been commenced by the construction of the lock and dam at Henry, as a part of the system of locks and dams to the number of five, projected by engineers for the complete improvement of the navigation of the Illinois river, and that no further progress could be made in that direction without a further appropriation, and that "such appro- "priation being now necessary for the building of a lock or "dam at or near Copperas Creek, which when completed, "will add fifty-nine miles of river transportation and thus "tend to the reduction of freights to the head waters of "Lake Michigan and to the Mississippi river; therefore, "be it enacted," etc.

Section 1. "That there be and is hereby appropriated "the net proceeds of the revenues derived from the Illinois "and Michigan Canal and the lock at Henry, on the Illi- "nois river, until the expiration of the first quarter of the "fiscal year after the adjournment of the next regular ses- "sion of the General Assembly, to be expended by the canal "commissioners in the construction of a lock and dam at or "near Copperas Creek, and necessary work in connection "therewith; said lock not to be less than 350 feet in "length and seventy-five feet in width."

Section 6. "Said commissioners shall not obligate the "state for the payment of any money in excess of the ap- "propriation made for the purpose, herein named."

The foregoing are the only provisions of this act necessary to be considered in this connection.

By the act of July 1st, 1874 (revised statutes of Illinois 1874, p. 188, state ed.), this whole subject of legislation relating to canal and river improvement was revised. By this act it was provided that the canal commissioners should have general control of the Illinois and Michigan Canal, and by section 8 they were specifically given control of "all locks and dams and other im- "provements of the navigation of the Illinois and Little "Wabash rivers," and authorized—

First. "To prescribe reasonable rules and regula- "tions in respect to all matters connected with the navi- "gation and use of the said canal, locks and dams, and "transportation on or to the same."

Second. "To establish and collect reasonable rates of "toll for the passage and use of said canal and said locks; "provided, that the use of said canal and locks shall be "free for the transportation of any property of the United

merce upon the Illinois river, to navigate the same as one of the acknowledged navigable streams and public highways and so recognized by numerous acts of congress; assume complete control over the commerce of the river, and impose tolls and tonnage duties for the right to navigate a stream and public highway navigable in its natural state? And, Second, whether the general assembly has the constitutional power, under the specious pretext of *extending the Illinois and Michigan Canal*, to appropriate the revenues of the state arising from the *canal*, or any other source, to the construction of locks and dams upon the Illinois river? It is submitted that both these propositions must be answered in the negative.

It is alleged in the bill, and of course admitted by the demurrer, that the defendants under their appointment by the Governor as canal commissioners, proceeded to construct the dam and lock across the Illinois river at Henry, and completed it in the year 1872, and thereby impeded wholly the navigation of the river by steamboats and other vessels that were before accustomed to navigate the same, except by the passage of the vessels through the lock; and that the commissioners, assuming to act in pursuance of the statute of Illinois, prescribed rates of toll and charges for the passage of the lock by steamboats and other vessels, as follows: For lockage, three cents per ton upon the tonnage measurements of freight boats and steamboats, and one and one-half cents per ton upon the tonnage measurements of ice-boats; and in addition thereto a charge of six cents per ton *upon all the ice transported in vessels through the lock;* and this rate continued until about the 6th of May, 1872, when the *tonnage* charges were reduced to one and one-half cents per ton, tonnage measurement of the vessels, and

the charge upon the cargoes of ice to three cents per ton, at which rates they remained until the year 1878, when the charge or toll upon the *tonnage measurement of the vessels* was reduced to one cent per ton; which charges and tonnage duties the complainants have been compelled to submit to, (Record p. 4-5) notwithstanding their protest that it was unlawfully exacted.

That there was exacted of the complainants from the time of the construction of these locks down to the spring of 1878 as tonnage duties or charges upon the tonnage measurement of their vessels the sum of nearly $3,000, and upon their cargoes of ice transported during the same period about the sum of $5,000, and that their average yearly shipments have been quite as large since the last mentioned date as before. That said locks and dams in no wise promote the interests of the complainants or facilitate the navigation of the river by their steamboats and ice barges, but on the contrary; "they are practically "obstructions to the free navigation of said river and en- "tail upon your orators large expenses annually, to pass "said locks with their steamboats and ice barges, which "said dams and locks require your orators to break up "their fleets of ice barges that their vessels may be passed "through said lock, necessarily causing great delay and "large expenses, and many times detentions, which, in "some instances, owing to the imperfect condition in which "said locks were constructed, and the obstructions to the "entrance thereto continuing for several weeks at a "time; and thus the tolls and tonnage duties im- "posed upon your orators are simply a tax upon "the business of your orators, without any com- "pensatory advantages resulting to your orators from the "construction of said locks and dams." (Record p. 6-7).

merce upon the Illinois river, to navigate the same as one of the acknowledged navigable streams and public highways and so recognized by numerous acts of congress; assume complete control over the commerce of the river, and impose tolls and tonnage duties for the right to navigate a stream and public highway navigable in its natural state? And, Second, whether the general assembly has the constitutional power, under the specious pretext of *extending the Illinois and Michigan Canal*, to appropriate the revenues of the state arising from the *canal*, or any other source, to the construction of locks and dams upon the Illinois river? It is submitted that both these propositions must be answered in the negative.

It is alleged in the bill, and of course admitted by the demurrer, that the defendants under their appointment by the Governor as canal commissioners, proceeded to construct the dam and lock across the Illinois river at Henry, and completed it in the year 1872, and thereby impeded wholly the navigation of the river by steamboats and other vessels that were before accustomed to navigate the same, except by the passage of the vessels through the lock; and that the commissioners, assuming to act in pursuance of the statute of Illinois, prescribed rates of toll and charges for the passage of the lock by steamboats and other vessels, as follows: For lockage, three cents per ton upon the tonnage measurements of freight boats and steamboats, and one and one-half cents per ton upon the tonnage measurements of ice-boats; and in addition thereto a charge of six cents per ton *upon all the ice transported in vessels through the lock;* and this rate continued until about the 6th of May, 1872, when the *tonnage* charges were reduced to one and one-half cents per ton, tonnage measurement of the vessels, and

the charge upon the cargoes of ice to three cents per ton, at which rates they remained until the year 1878, when the charge or toll upon the *tonnage measurement of the vessels* was reduced to one cent per ton; which charges and tonnage duties the complainants have been compelled to submit to, (Record p. 4-5) notwithstanding their protest that it was unlawfully exacted.

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The bill sets forth more specifically the particular grievances of the complainants, to which the attention of the court is called; but it is believed that the foregoing statement is sufficiently specific to indicate to the court the objection insisted upon to the collection of these tonnage charges and other charges upon the cargoes of ice, to which the complainants have been thus subjected in pursuing an inter-state commerce in the shipment and transportation of ice from points upon the Illinois river within the state of Illinois, to points upon the Mississippi, Cumberland, and other rivers without the state of Illinois. To all this the only answer substantially made in the court below, as a justification for this assumed control by the canal commissioners, as the representatives of the state, of the navigation of the Illinois river, and commerce upon the same, and the imposition of these tolls and tonnage charges, was, that it was simply a charge which the state might lawfully impose *for the use of the locks and dams*, by which it was *assumed*, an improved condition of navigation was effected. The learned judge, before whom this case was heard, says in his opinion (Record 17–18.) "The Court "is of opinion that the right of the state to charge for the "use of its locks *may be placed upon the same ground up-* "*on which rests the authority of municipal corporations* "*owning improved wharves upon the navigable waters* "*of the United States, to charge for the use of such* "*wharves by vessels*, even those licensed under the "laws of the United States, and engaged in com- "merce with foreign nations or among the several states. "Municipal regulations of this character have been main- "tained, *even where the wharfage fees are measured by* "*the tonnage of the vessel using the wharves.* Such fees

"so measured, are *not deemed duties of tonnage* within the "meaning of the constitution, where they are exacted, "not for the mere privilege of landing at the wharf, but "as *fair and reasonable compensation for the use of addi-* "*tional facilities furnished for those engaged in commerce.* "*Packet Co. vs. St. Louis, 100 U. S. 429; Vicksburg vs.* "*Tobin 1b 430; Packet Co. vs. Keokuk, 95 U. S. 80.* So "in reference to tolls for the use of locks constructed on a "navigable stream lying wholly within a state. Al- "though measured by the capacity of the vessel or the ex- "tent of the cargo, they are not necessarily tonnage duties "which the state are prohibited from laying. They are "not, within the meaning of the Contitution, duties upon "the vessel or its cargo, but compensation exacted for the "use of improved commercial fabilities. In this case, it "cannot be claimed that the charges exacted by the com- "missioners are disproportioned to the amount expended "by the state in the construction of these locks and dams, "or that they are in themselves unreasonable in amount. "It * * * * is unnecessary to ex- 'tend this discussion. The court is of opinion, "for the reasons given, that the State of Illinois has "the same power to improve navigable waters witnin "her limits that she possesses over other highways; and "where money has been expended in making other im- "provements, it is competent for the State to impose tolls "for their use, even where the stream is one to which the "regulations of commerce may extend, * * "* * subject always to the qualification "that the motion of the state touching naviga- "ble waters within her borders is subordinate to "the paramount authority of the action, whenever and as "it may be exercised, under the power granted to congress

"of regulating commerce with foreign nations and among "the several states."

Entertaining this view of the case, the court below sustained a general demurrer to the complainants' bill for want of equity, and ordered the same dismissed. [Record 10-12.] This decision of the court is assigned for error. [Record 20.]

The Illinois river is and always has been since the settlement of the country a navigable stream—navigable in fact—and upon which a large commerce has been carried on, from various points on the river to various points on the Mississippi, as far south as New Orleans, and also to points on the Ohio, Cumberland and Tennessee rivers. It was so recognized at the time of the adoption of the ordinance of 1787 for the government of the northwestern territory, and has been since repeatedly recognized by the Federal courts and the courts of Illinois and of other States, and by Congress, by the passage of numerous appropriations for its improvement, and other legislation with respect thereto, as a public highway and important channel of inter-state commerce.

The act of congress relating to the sale of public lands, of May 18, 1796, re-enacted at various times since then, and still in force as section 2,476 Rev. Stat. of the United States, provides "that all rivers within the terri- "tories occupied by the public lands shall remain and be "deemed public highways."

See Schurmier v. R. R. Co., 7 Wall., 272.

Vol. 1 U. S. Stat. at Large, 468.

Vol. 2 U. S. Stat. at Large, 235.

In *R. R. Co. v. Schurmier*, *supra*, this statute was construed by the court, and it was there held that the proprietors of lands bordering on navigable rivers under titles derived from the United States, held only to the stream, as the express provision was "that all such riv-"ers should be deemed to be and always remain public "highways." (p. 287.)

(1.) By paragraph 3 of section 8, article 1 of the constitution of the United States, congress has the power "to regulate commerce with foreign nations, and among "the sevetal states and with the Indian tribes."

(2.) By article 4 of the ordinance for the government of the northwestern territory, of July 13, 1787, it is provrded, "the navigable waters leading into the Missis-"sippi and St. Lawrence, and the carrying places be-"tween the same shall be common highways, and for-"ever free as well to the inhabitants of said country as to "the citizens of the United States, and those of any "other states that may be admitted into the confederacy "without any tax, impost or duty thereon."

(3.) By article 5 of the same ordinance it was provided, "the constitution and government so to be formed "shall be republican and in conformity to the principles "contained in these articles so far as it can be consistent "with the general interests of the confederacy."

(4.) The act of congress, of August 1789, providing for the government of the territory northwest of the river Ohio, continued in force the above provisions of the ordinance of 1787, after the adoption of the constitution of the United States.

U. S. Stat. at Large, Vol. 1, p. 50.

(5.) By the act of congress of March 26, 1804, making provision for the disposal of public lands in the INDIANA territory (see section 6), it is provided that "all navig- "able rivers, lakes and waters within the territory shall "be deemed to be and remain public highways."

U. S. Stat. at Large, Vol. 2, p. 279.

(6.) The territory to which the ordinance of 1787 related has since been formed into the states of Ohio, Indiana, Michigan, Illinois, Wisconsin and part of Minnesota. In these several states article 4 of said ordinance relating to free navigation of the rivers therein is in full force and effect, either by re-enactment thereof in terms or by adoption thereof by the states.

See Strader v. Graham, 10 How., 96-8.

(7.) See act congress May 17, 1800, dividing the northwestern territory, and securing to the people all the privileges granted by the ordinance of 1787.

U. S. Stat., p. 59, Sec. 2.

(8.) The same rights were preserved by the act of congress dividing territory of Indiana, February 3, 1809.

2. *U. S. Stat.*, p 515, Sec. 2.

(9.) By the act of congress April 18, 1818, to enable the people of Illinois to form a constitution and state government, &c., it was provided "that the same, when- "ever formed, shall be republican, and not repugnant to "the ordinance of the 13th of July, 1787, between the "original states, and the people and states of the terri- "tory northwest of the Ohio river, excepting so much of

"said articles as relate to the boundaries of the states "herein to be formed." (See section 4.)

For convenience see Scates' Stat., Ill., p. 42.

(10.) By the ordinance of the Illinois convention of Aug. 26, 1818, Illinois accepted the terms of admission prescribed by the act of congress,

1 *Scates' Stat., Ill.*, p. 44,

which preserved to the citizens of all the states which might be thereafter formed the free navigation of all the rivers within the same.

And further covenanted as follows: "And this con- "vention do further ordain and declare that the foregoing "ordinance shall not be revoked *without the consent of the "United States.*"

(11.) The act of congress of July 14th, 1870, re-enacted as section 4220 of the U. S. R. S.; provides that "no ves- "sel belonging to any citizen of the United States trading "from one port within the United States to another "port within the United States * * * shall be subject "to tonnage tax orduty, if such vessel be licensed, regis- "tered or enrolled."

See also Sec. 2793 U. S. R. S.

(12.) By the third paragraph of section 10 of article 1 of the federal constitution, it is provided that "no state "shall without the consent of congress lay any duty of "tonnage."

In view of the facts alleged in the bill and admitted by the demurrer, and in relation to which no controversy can arise upon this record or otherwise, it is insisted on

behalf of the appellants that the circuit court erred in sustaining the demurrer for the reasons hereinafter more particularly stated.

I.

I have no desire to contend against the views heretofore expressed by this court, with reference to the effect of the ordinance of 1787, or to reopen any discussion of this question further than to call the attention of the court to one circumstance in this connection to which the attention of this court does not seem to have been called in the consideration of the late case of *Escanaba vs. Chicago* (107 U. S. 678) viz: that the state of Illinois in the *acceptance* of the act of congress under which it was authorized to organize, by the concluding portion of the act of acceptance, *expressly covenanted* with respect to the ordinance of 1787, *that it should not be revoked "without the consent of the United States."* It would seem that this was equivalent to an express adoption of the particular provisions of that ordinance with respect to the navigable water-courses to which such a degree of importance had been attached. It is undeniable, I think, that this provision of the ordinance of 1787 was commonly understood to be binding and operative to control the navigation of all such streams as were navigable in fact, covered by its provisions. One of the conditions was, that *the navigation of such streams should be free*; not only free from the imposition of any taxes, imposts or duties for the privilege of the navigation thereof, but free from any obstructions by or under the authority of any state formed out of the Northwestern Territory, by which the navigation of the rivers could in any substantial manner be obstructed or impeded.

If this covenant can be held to be binding and to have been recognized by the state of Illinois (and there has been, as I assume, no repudiation or disclaimer of its force and effect on the part of the state), it is respectfully submitted that I am justified in asking the serious attention of the court to the question, whether this solemn covenant ought not still to be regarded as impliedly at least, in force with respect to the state of Illinois, whatever may be said with reference to its application to the other states formed out of the northwestern territory—notwithstanding the recent decision in the *Escanaba* case.

II.

In view of the commerce clause of the Constitution, and the several acts of congress to which the Court has been referred, and the conceded facts shown by this record, had the state of Illinois, without the consent of congress, the lawful right to assume exclusive control over the Illinois river, and to erect dams across it, and thus force steamers and other vessels, before then navigating the river in its natural state as such public channel of inter-state commerce, to pass through locks constructed at these dams, and pay tonnage duties and other impositions, in order to enjoy the privilege of navigating it, which they had before enjoyed without restriction?

The assumption of this extraordinary power on behalf of the state of Illinois with respect to one of the most prominent navigable streams of commerce, it is believed, has no parallel in the history of this country. By way of illustration, the inquiry is

suggested here, would it be claimed for a moment, for instance, that the State of New York, without the consent of congress, could assume exclusive jurisdiction over the navigation of the Hudson river; put therein a series of locks and dams; impose tolls and tonnage duties for the privilege of navigating the river by vessels, which from the settlement of the country, had been accustomed to navigate it in its natural state, upon the pretext of effecting an "improved navigation," or with a view of extending the Erie Canal from Albany to New York, and thereby add to the revenues of the Canal? Would it be compatible with public interests to sanction the exercise by the state, without the consent of Congress, of such extraordinary powers over one of the principal navigable streams of the country? It is respectfully submitted that such a recognition of the powers of the state over the commerce of the country cannot be tolerated without resulting in embarrassments and complications between the state and the Federal governments of the most disastrous character.

The power of Congress under the commerce clauses of the Constitution extends necessarily to the control of all navigable rivers forming the channels of inter-state commerce; that is to say, *navigable in their natural state*. The power of Congress over such navigable streams must necessarily be exclusive; for it would be entirely incompatible with the sovereign power of the Federal government over such navigable streams, to permit a state, upon its own volition, to determine whether such streams shall be obstructed by dams or other means, and the conditions upon which they may be navigated at all.

Unless there has been some specific delegation of power

to the state by Congress, authorizing the erection of dams and other structures, and the imposition of tolls and other impositions upon the navigation of the river, such a recognition of power by the state over the commerce of the country cannot be maintained under the principles recognized by this court in the early case of

Gibbons vs. Ogden, (1 Wheat., 89).

This case has been much commented upon, and some portions of the different opinions of the various judges criticised; yet, there has been no substantial departure, it is believed, from the doctrine there maintained. It was there held that the "constitutional power of Con-"gress to regulate commerce among the states necessar-"ily extends to the regulation of navigation and every "species of commercial intercourse between states, but "not to commerce wholly internal. This power is "plenary and has no limitations, except such as are pre-"scribed by the constitution. [pp. 193-196.] It is "plenary as to its objects, and exclusively vested in "Congress, and no part of it can be exercised by the state. "While the Federal government may impose taxes and "the state may impose taxes for purposes within its juris-"diction, each government exercises the power inde-"pendent of the other, but when a state proceeds to regu-"late commerce with foreign nations or among the "several states, it is exercising every power which is "granted to Congress, and doing the very thing which "Congress is authorized to do. There is no analogy "whatever between the power of taxation and the power "to regulate commerce." [p. 199.]

It is further said in this case, "A duty of tonnage is

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It is further said in this case, "A duty of tonnage is

"as much a tax as a duty on exports, and the reason "which induced the prohibition of these statutes extends "to this also. This tax may be imposed by a state with "the consent of Congress, and it may be admitted that "Congress can give the right to a state in virtue of its "own power; but a duty of *tonnage* being a part of the "power of imposing taxes, its prohibition may certainly "be made to depend on congress without affording any "implication respecting the power to regulate commerce. "It is true that duties may often be, and in fact are, im- "posed on tonnage with a view to regulating commerce, "but they may also "be imposed with a view to revenue, "and it is therefore *a prudent precaution to prohibit the* "*state from exercising this power.*"

In the case of *Welton v. Missouri*, 91 U. S., 275 (Opinion 282), this Court said: "The fact that Congress "has not seen fit to frame any specific rules to govern "inter-state commerce does not affect this question. Its "inaction on this subject when considered with reference "to its legislation with reference to foreign commerce, "is equivalent to a declaration that inter-state com- "merce shall be free and untramelled."

It was urged in the court below that because the Illinois river is wholly within the state from its source to its junction with the Mississippi, that therefore it is not a channel of inter-state commerce, but simply a water-way wholly within the jurisdiction of the state, and over which the sover- [221] eign power of the state has complete control with respect to its navigation—at least until Congress shall see fit to assert its paramount jurisdiction. This view is not maintainable. If the stream originated and terminated

wholly within the state and formed no continuous channel of commerce by connection with any other navigable waters, the jurisdiction of the state over the same as a channel of local commerce would not be questioned; but inasmuch as the Illinois River has always been navigable in fact, and as a matter of history classed amongst the most important channels of inter-state commerce, carried on by water, communicating as it does with the Mississippi River, and thus forming a continuous channel of communication, by its connection with the Illinois and Michigan Canal, through the interior of the state, between Lake Michigan and the Gulf of Mexico, it is in no sense a local channel of inter-state commerce, but a navigable stream, thus affording communication by water to the Gulf of Mexico, and to points upon the Ohio, Tennessee and Missouri Rivers, and many other navigable streams of less importance.

In *South Carolina vs. Georgia*, 93 U. S., opinion p. 10, speaking of the compact between South Carolina and Georgia, with respect to the Savannah River as the boundary between the states and its navigation, this court said: "It needed no compact to give to the citizens "of adjoining states a right to the free and unobstructed "navigation of the navigable river which was the boun- "dary between them. It matters not to this case how "the right was acquired, whether under compact or not, "or what the extent of the right of South Carolina was "in 1787. After the treaty between the states was made, "both parties to it became members of the United States. "Both adopted the Federal Constitution, and thereby "joined in delegating to the general government the right "to regulate commerce with foreign nations and among the

"several states, * * * but the power to regulate com-
"merce conferred by the Constitution upon Congress
"is that which previously existed in the states, as was
"said in *Gilman v. Phile*, 3 Wall., 724, 'Commerce in-
" 'cludes navigation. The power to regulate *commerce*
" '*comprehends the control for that purpose and to the*
" '*extent necessary of all navigable rivers of the United*
" '*States, which are accessible from a state other than*
" '*those in which they live.* For this purpose they are
" 'the public property of the nation and subject to all
" 'the requisite legislation by Congress. This necessar-
" 'ily includes the power to keep them open and *free from*
" '*any obstructions to their navigation interposed by a*
" '*state or otherwise.* * * * For these purposes Congress
" 'possesses all the powers which existed in the state be-
" 'fore the adoption of the National Constitution and
" 'which has always existed in the Parliament of Eng-
" 'land.' Such has uniformally been the construction
" given to that clause of the Constitution which confers
" upon Congress the power to regulate commerce."

In the case of *The Daniel Ball* (10 Wall. 502, opinion 577), this Court held, that rivers are navigable waters of the United States, when they form, in contradistinction from the navigable waters of the state, by uniting with other waters, a continuous highway over which commerce is or may be carried on, in the customary way in which such commerce is conducted.

And in the case of the *Montello*, 20 Wall. 430, the same principal is recognized, and the test applied by the court to determine whether a stream is navigable within the meaning of the act of Congress, is simply whether in its *natural state* it is capable of being used

for the purposses of commerce, no matter in what mode that commerce may be conducted.

In Henderson vs. Mayor, etc., of New York, 92 U. S. 259, the Court after reviewing the case of *Cooley vs. The Wardens*, 12 How. 299; *Gilman vs. Philadelphia* 3 Wall. 715, and other cases, speaking through Mr. Justice Miller, said, "These decisions, however, all agree that "under the commerce clauses of the Constitution, or "within its compass, there are powers which from their "nature are exclusively in Congress." And in the case of *Colley vs. The Board of Wardens*, 12 How 299 it was said that "whatever subjects of this power were in their "nature national, or admitted of one uniform system "or plan of regulation, may justly be said to be of such "a nature as to require *exclusive* legislation by Con- "gress."

There is nothing in the record in this case which supports the assumption upon which the case seems to have been determined in the court below, that the Legislature in imposing these tonnage duties, based upon the tonnage measurement of the vessels, and the additional charge based upon the specific articles transported by the complainants while pursuing an inter-state commerce, being nothing more nor less than a direct impost upon propery *in transitu*, were imposed for the simple purpose of obtaining compensation for what assumed to be an "improved navigation." On the contrary these imposts were apparently, and I may add, necessarily, for the privilege of navigating the river. The Legislature have not only assumed to impose a tonnage duty within the meaning of the act of Congress, but a direct tax upon the cargoes, aimed specifically at the particular charac-

ter of the freight transported, namely: ICE. These imposts fall directly within the case of *State Freight Tax, 15 Wal. 252*, so far as they relate to the ice being transported by the complainants down the river, to be distributed at different commercial points without the limits of the State of Illinois. As said by this Court in *Telegraph Co. vs. Texas, 105 U. S., 464*, in commenting upon the *State Freight Tax* case, "In this, the court "should apply the rule announced in *Brown vs. Maryland, 12 Wheat., 419*, that where the burden of taxation falls on a *thing* which is the subject of taxation, "the tax is to be considered as laid on *the thing*, rather "than on him who is charged with the duty of paying it "into the treasury," citing a series of decisions of this court which are unnecessary to particularize here. The Court further say in the *Telegraph Company* case, (105 U. S. 460), "taxes on vessels according to the measurement without any reference to the value were declared "to be taxes on tonnage:" state tonnage cases, *12 Wal., 204; Peete vs. Morgan, 19 Ib., 581; Cannon vs. New Orleans, 20 Ib., 577*, and *Inman Steamship Company vs. Tinker, 94 U. S. 238*. From which the Court argue, that if a tax for every two thousand pounds of freight carried is a tax upon the *freight*, or for every measured ton of a vessel, a tax upon *tonnage*, etc., the tax imposed by the State of Texas in that case was but a tax of the messages, and so far as it operates upon messages sent out of the state that it was a regulation of foreign and inter-state commerce.

Again, this court in *Moran v. New Orleans*, 112 U. S., 73-4, expressly approve the doctrine in the *Telegraph Company* case and the *State Freight Tax* case and *Brown*

v. Maryland, 12 Wheat., 419, and say: "It has often been "judicially declared that vessels engaged in foreign or in- "ter-state commerce, duly enrolled and licensed under "the acts of Congress, may be taxed by state authority "as *property*; provided the tax be not a tonnage tax and "is levied only at the port of registry, and is valued as "other property in the state without unfavorable dis- "crimination on account of its employment." But the court adds, "The license fee in the present case is not a "tax upon the boats as property according to any valu- "ation."

So in the present case, the complainants' boats, and the property transported (before shipment), were subject to general taxation like other property within the jurisdiction of the state, but the legislature has assumed to authorize the defendants, as canal commissioners, to impose a specific tax upon the tonnage capacity of vessels and a specific tax upon the cargoes of ice while being transported in the ordinary course of their business as articles of inter-state commerce. The Legislature assumed to do this in this instance, not by way of compensation for "improved navigation," but for purposes of general revenue, to swell the revenues of the Illinois and Michigan Canal, over which it has exclusive jurisdiction. To attain this end the defendants, acting under this supposed authority, have taken absolute possession of this public highway over which Congress has paramount jurisdiction, because as said by counsel in the court below, it is wholly within the state, and have said to all engaged in the river commerce,

"You shall not be permitted to use this public highway "at all without you submit to these exactions by way of

"tonnage charges and specific charges imposed upon the "cargoes being transported to points without the state;" and by the construction of the dams they have rendered the navigation of the river impracticable except in times of extraordinary high water, unless those engaged in such commerce submit to these exactions. This specific tax imposed upon the cargoes being transported in the complainants' vessels while engaged in an inter-state commerce, it is submitted, cannot be otherwise than a tax upon the *property* transported while in *transitu*, for the purpose of revenue. The property in *specie* is thus made subject to this imposition irrespective of value and a direct tax upon it as a subject of inter-state commerce. It is certainly clear that it would cost no more to lock a vessel through of one thousand tons burden, tonnage measurement, if loaded with *ice* than it would if it were loaded with any other commodity—or if not loaded at all.

For this lockage a tonnage tax was imposed upon the tonnage measurement of the vessel in addition to this extraordinary assumption of power over the property itself while *in transitu*—the subject of inter-state commerce was burdened with another specific imposition, and the complainants and others navigating the river and engaged in an inter-state commerce were told "Un- "less you will submit to these exactions you must be "denied the privilege of navigating this channel of inter- "state commerce;" a River navigable in its natural state, and navigated without interruption from the earliest settlement of the country to the time it was obstructed by the erection of the dams.

The case of *Transportation Company vs. Wheeling*, 99 U. S. 273, fully supports the view here sought to be

maintained. Cooley in his work on Limitations, 4th Edition, 606, says, "Vessels are taxable as property; "possibly the tax may be measured by the capacity, "when they are taxed only as property, but *not as ve-* "*hicles of commerce.*" To which quotation, Mr. Justice Clifford adds, "It may be true, if it clearly appears that "the tax is to the owner in the locality of his residence, "and is not a tax upon the ship as an instument of "commerce." In the case of *Inman Steamship Company vs. Tinker*, 94 U. S. 238, this Court, speaking through Mr. Justice Swayne said, "Tonnage in our "law, is the vessel's internal cubic capacity in tons of "100 cubic feet to be ascertained in a manner to be pre- "scribed by Congress * * * * Tonnage duties are "duties upon vessels in proportion to their capacity. "(Bouv. Law Dict. 'Tonnage') * * * * The "State in passing this law imposing tonnage has exer- "cised a power expressly prohibited to it by the Consti- "tution. * * * * "This view, is sustained by the "rulings of this Court in the State Tonnage Tax cases. * * * * * * * * *

"The tax imposed is not merely a mode of measuring "compensation to be paid. The answer to this suggestion "is that it is exacted where there is nothing to be paid for, "and has no reference to any circumstance in this con- "nection, but the tonnage of the vessel and the class to "which it belongs."

In the *Passenger* cases, 7 Wall., 283, it was said (opinion 447), "If a state tax, with the consent of Congress, "the vessel directly by tonnage * * * * or taxes the "cargo by an impost, or assumes to tax passengers or to "regulate it in any other mode, she assumed the exercise

"of the jurisdiction of Congress, and to regulate navi-
"gation she does that which Congress has the power to
"do and is authorized by the Constitution within the
"same limit to which Congress is restricted, and Con-
"gress cannot raise money for the benefit of the state
"treasury, so neither can a state exercise the same power
"for the same purpose."

Mr. Justice Greir in delivering the opinion says (p. 462), that the object of this provision (referring to the constitutional restriction), "was to protect both vessel "and cargo from state taxation while *in transitu*, and "that the power cannot be evaded by calling it a tax on "the master or passenger. * * * * The power to "tax this intercourse challenges the rights to exclude it "altogether and thus thwart the policy of the other "states. * * * * Congress has regulated commerce " and intercourse between the states *by willing that it* "*shall be free*, and it is, therefore not left to the discre-
"tion of the state to exact duty for permission to exer-
"cise it."

In the case of *The Daniel Ball*, 10 Wall., 562, the vessel was navigating Grand River from Grand Haven to Grand Rapids; was but 23 tons burden; was not staunch enough to navigate the lake; nor did she run in connection with any other steamer or vessel on the lake or on any railroad. Mr. Justice Field says, in delivering the opinion of the court (p. 563), "Those rivers must be re-
"garded as being navigable rivers in law which are nav-
"igable in fact, and navigable in fact when susceptible
"of navigation in their ordinary conditions as highways
"of commerce; and they constitute navigable waters of

"the United States within the meaning of the act of Con-
"gress * * * * when they form in their ordinary
"conditions by themselves or by uniting with other
"waters, a continuous highway over which commerce
"may be carried on with other states in the customary
"mode in which such commerce may be conducted by
"water."

It is further said (p. 565) "So far as she was engaged in "transporting goods destined for other states, or goods "from without the limits of Michigan and destined to "places within the state, she was engaged in commerce "between the states. However limited that commerce "may have been, she was, as far as it was, subject to the "legislation of Congress, for whenever a commodity has "begun to move as an article of trade from one state to "another, commerce in that commodity between the states "has commenced."

It is alleged in the bill and admitted by the demurrer that the erection of these dams were practical obstructions to the navigation of the river by steam boats and barges which were accustomed to navigate the river in its natural state. So far as river commerce was affected by their construction it was affected injuriously, and no compensatory advantages result to those engaged in river commerce proper by the construction of these dams and locks. The purpose of their construction was not primarily to increase the facilities for navigating the river by steamers and other vessels adapted to its navigation, but which from their capacity and tonnage could not navigate the Illinois and Michigan Canal, but to especially afford additional facilities for canal boats navigating the canal to navigate the

river, and to increase thereby and by these unlawful impositions upon the vessels navigating the river only, revenues of the canal proper, as canal boats owing to their construction require a much greater depth of water than the flat-bottomed steamers and vessels navigating the river, and owing to the low stage of water in the river at times canal boats could not pass from the canal down the river to St. Louis and return. In other words, the revenues of the state arising from these impositions upon Steamers and other large vessels that could not navigate the canal, and their cargoes, from which otherwise no revenues would be derived, would swell the general revenues of the state if imposed upon them for the *privilege* of passing through these locks and dams under the crafty pretext of affording an "improved navigation" for river commerce.

The recent decision of this Court in *Gloucester Ferry Co. vs. Pennsylvania*, (114 U. S, 196), is also, as is believed, in harmony with the views here endeavored to be maintained.

In *Mobile vs. Kimball, 106 U. S., 691*, while this Court conceded to the states the full control over their purely internal commerce and their right to remove obstructions from harbors and rivers and deepen their channels and improve them generally, yet it is said "they "may do these acts *if they do not impair the free naviga-"tion as permitted under the laws of the United States*, "or defeat any system for the improvement of their nav-"igation provided by the general government." See *Cannon vs. New Orleans, 20 Wall., 577*.

III.

The impositions assumed to be made upon the vessels of the complainants and their cargoes are direct taxes upon the *vessels as instruments of inter-state commerce*, and upon the *cargoes as subjects of inter-state commerce*, without reference to either the value of vessels or cargoes, for the privilege of navigating the Illinois river; a public highway of the United States over which Congress has exclusive jurisdiction.

These acts of the General Assembly of the State of Illinois under which the defendants assumed jurisdiction of the river and impose these tonnage duties and taxes upon the cargoes being transported, it is submitted, afford no justification for this interference with the navigation of the river and the collection of these duties. They were simply flagrant violations of the Federal Constitution, and the only substantial answer that has thus far been made in vindication of these unlawful acts of the defendants is, that these tonnage duties and specific impositions are a mere charge for this falsely assumed "improved navigation" of the river. This position, it is insisted, is entirely untenable.

As before remarked, under the act of 1869 no authority was given for the collection of tolls for the passage of the lock proposed to be constructed; not until the constitution of the state prohibited appropriations for the construction of canals was it attempted to impose these excessive charges upon the river commerce. The object sought by this act authorizing the erection of this first

lock and dam at Henry was to permit the passage of canal boats that were accustomed to navigate the canal, over the bars in the rivers *at all times of the season*, and thus increase the revenues of the canal, and this was the "compensation" that was contemplated, in the first instance, that the state would derive for what was termed its *improved navigation* of the Illinois River. It was never assumed for a moment by those who were instrumental in procuring the passage of this act by which this improvement was practically inaugurated, that the state had any right to assume jurisdiction over or control navigation upon the river. It was not intended to obstruct it and at the same time impose onerous duties for the constitutional right of all persons engaged in inter-state commerce to navigate the river. It was simply intended by the construction of a series of locks and dams to render the river navigable at all times of the year during the periods of navigation, *so that canal boats* (which draw more water than many large steamers) *could pass from the river into the canal; whereas their inability to do so at all times diverted the shipment of produce upward along the Illinois river that naturally sought Chicago as a market, down the river to St. Louis, or upon the railroads leading across the State, by which Chicago was avoided, and in consequence the State lost the tolls that otherwise might be realized if that commerce could be carried on by by the use of the canal.*

This case does not rest upon the principles, upon which the cases of *Packet Company vs. Keokuk*, 95 U. S. 80; *The Packet Company vs. St. Louis*, 100 U. S. 423; *Packet Company vs. Cattlesburg*, 105 U. S. 559; *Vicksburg vs. Tobin*, 100 U. S. 430; *Transportation Company*

vs. Parkersburg, 107 U. S. 691, and other kindred cases which support a charge for use of *artificial channels* wharves and like improvements made by the state and which the state in the exercise of its local authority has the undoubted right to make, and which do not operate as a restraint upon navigation of the navigable rivers or waters of the United States by such vessels as were accustomed to navigate them in their natural condition. None of this class of cases are applicable to the case at bar. It is admitted that the complainants were engaged in inter-state commerce; that the cargoes of ice transported in their vessels were subjects of inter-state commerce. It is admitted that facilities for navigating the river were not increased by the construction of locks and dams, but were impeded seriously, and that they were subjected to heavy losses.

The river commerce did not require the construction of these locks and dams. It was not the primary object of the state, in authorizing the construction of these locks and dams to promote inter-state commerce or any other commerce *upon the river* which was carried on by means of steamers and other vessels which were solely adapted to navigation of the river and not adapted to the navigation of the Canal. If there were falls, rapids, bars or other obstructions in the course of the river, which might be avoided by the construction around them of artificial channels which might have been made without any interference with the public passage of the river by such steamers and vessels as were formerly accustomed to navigate it in its natural condition, no one doubts that the state might make such additional artificial channels if they might or could be used by those engaged in inter-state river com-

merce, and charge therefor; but that is a very different matter from assuming to take the entire charge, control and jurisdiction over a navigable stream subject to the paramount and exclusive authority of Congress, and providing that unless those navigating the river submit to use the artificial channels and artificial structures erected by the state, they shall be prohibited from navigating the river at all. The state has the unquestioned right to exact tolls for the passage of canal boats through the canal which it has constructed from Chicago to Peru and La Salle, covering a distance of 100 miles, and possibly measure the compensation to be paid for the use of the canal by the tonnage of the vessels navigating it or the amount or value of the cargoes being transported, but in this instance the imposition assumed to be made by the state is two-fold, viz: a tonnage duty upon the *tonnage capacity* of the vessels navigating the river *as instruments of commerce* and a direct tax imposed upon the *cargoes* being transported *as subjects of commerce*, without any reference to their value, and regardless of any and all other considerations, and this for the privilege (?) of navigating the Illinois river, a public highway of the United States over which Congress has exclusive jurisdiction.

If the state may do this, why is not its power *supreme* in the matter and exclusive to the same extent as said in the case of *South Carolina vs. Georgia*, *Supra*, (with respect to the rights of those states to regulate commerce prior to their admission into the Union,) where, as this Court remarked, "They could have determined that all ves- "sels passing up and down the stream should pursue a "definite course, and they should pass along one chan-

"nel rather than another where there were two. They "had plenary authority to make improvements in the "bed of the river to divert the water from one channel "to another and to plant obstructions therein at their "will."

But this power which might have been exercised by the states before their admission in the Union was delegated to the general government. This being so, upon what principle can the state of Illinois assume to take exclusive control and jurisdiction over the Illinois River and obstruct it by a series of dams, and arbitrarily enact and declare that all vessels before then accustomed to navigate the river in its natural state, whether engaged in state or inter-state commerce, shall be denied the right to navigate the river at all unless the exactions imposed are complied with?

But particularly, the inquiry is suggested, why has the state assumed to impose taxes and burdens *of a two-fold character, viz.: upon the vessels, and upon cargoes*, wholly irrespective of valuations? The simple answer is, that this was done for the purposes of revenue, to swell the revenues of the canal. In other words, the general revenues of the state. And the suggestion that these unlawful and unconstitutional exactions were simply made as the compensation for an "improved naviga- "tion," is a mere device and make-shift to avoid responsibility for this clearly unconstitutional and unlawful act.

If the real object is to directly regulate or control commerce, although some other purpose may be recited, the real and not the expressed object must determine the character of the act.

Morris v. Boston, 45 Mass., 282.

Sinot v. Davenport, 22 Howard, 229.

Foster v. Davenport, 22 How., 244.

Henderson v. Mayor, etc., of N. Y., 92 U. S., 259.

A state cannot accomplish by indirect methods what it is forbidden by the Federal Constitution to do directly.

People v. Raymond, 34 Cal., 492.

It would be wholly immaterial, if true, that one of the purposes of these impositions was to obtain compensation for the assumed "improved navigation," if the general purpose was that of revenue and to control or interfere with the business and property of the complainants while pursuing an inter-state commerce.

The right of a state to construct artificial channels of commerce and charge for their use, is of course not questioned. It has undoubtedly the same right to impose such charges for the use of its own artificial channels of commerce that a railway company, or a transportation company, incorporated under the laws of the state, would have, which, by the appropriation of private funds has opened up an artificial channel for commercial intercourse. And it may be conceded that the state may base its charge for compensation for the use of its artificial channels, as is done for instance, in the case of the Erie canal, and other canals, upon the amount of tonnage transported by the vessels, or possibly upon the tonnage capacity of the vessel, provided such charges are reasonable (and are not imposed upon either the vessels or cargoes, *as instruments or subjects of commerce*), and merely for the purpose of obtaining a reasonable compensation

for the conveniences and facilities afforded for transportation which parties may avail themselves of or not. At least for the present purpose it is unnecessary to controvert this, but *as subjects and instruments of commerce merely*, the state can have *no right* to tax the vessels and cargoes for purposes of *revenue*. While it might tax them undoubtedly where they are owned, as other property is taxed for purposes of general revenue, yet the state would have no right to impose a tax upon them, based otherwise than upon the value of the property. In other words, the state can not impose a tonnage tax—a tax based upon the *cubical* capacity of the vessel as an *instrument* of commerce, nor could it impose an arbitrary tax based upon the actual tonnage of the *cargo* transported as a *subject* of commerce, and any attempt to impose such taxes or duties would be clearly in violation of the commerce clause of the Constitution and the acts of Congress. Such is precisely what has been done and what the State persists in doing in this instance, and just what it has no right to do.

The terminus of the canal proper being at La Salle, instead of continuing that point as the terminus, upon the completion of the lock and dam at Henry, the latter point was made the terminus, and upon the completion of the lock and dam at Copperas Creek—farther down the river—that point was made the terminus. So the practical effect was to impose no additional charges upon canal boats *navigating* the *canal* proper by reason of the construction of these locks and dams in the river. This additional navigation was gratuitous to the canal boats navigating the Canal, and an unjust discrimination was therein made with respect to vessels navigating the river, which is manifest from the recital in one of the

acts to which the attention of the Court was called in the introductory part of this brief.

It is admitted by this record that the locks and dams are so constructed as to actually obstruct the navigation of the river and render its navigation unsafe and hazardous, and subject those engaged in river commerce exclusively to a series of detentions and great pecuniary losses; and not withstanding all this, those engaged in river commerce exclusively with vessels that are only adapted to navigation of the river, are subjected to these unlawful duties and impositions upon the vessels as instruments of commerce and upon the cargoes transported as subjects of commerce. There is absolutely nothing in this record from which it may be assumed that these unlawful tolls and impositions were to any extent based upon any supposed advantages that would result to those engaged in commerce upon the river exclusively. On the contrary every presumption is against it. It is respectfully submitted that this case cannot be determined upon this record upon any such assumption, that the assumption is simply groundless and fallacious.

IV.

In conclusion, it is insisted that under the provision of the constitution of Illinois, set forth in the introductory part of this brief, the General Assembly had no authority whatever to appropriate the revenues of the state, whether derived from the canal proper, or any other source, to the building of locks and dams upon the Illinois River, unless the court is prepared to say that such appropriations were made for the "extension" of the Illinois and Michigan Canal; which involves, of course, the

concession that the state may, without the consent of Congress, take exclusive control and jurisdiction over one of the principal navigable rivers of the United States and convert it into a canal and make appropriations from the public treasury of the state for its improvement. If Congress has, as is assumed, paramount jurisdiction, and, when, if it elects to assert it, plenary power and exclusive jurisdiction over the navigable rivers upon which inter-state commerce is carried on, it may, when it elects so to do, take the entire and exclusive control of the Illinois River, with all the dams, locks and other structures and "improvements" which the Legislature of the State has assumed to place in it, and appropriate them to the use of the general government. If this be so, can it be said that under this *special restriction* contained in the constitution of the State of Illinois, the public revenues of the state can be appropriated to the improvement of *the Illinois River* upon the pretense that such appropriations are simply made for the "extension" of the Illinois and Michigan Canal. It is confidently believed that this cannot be held.

Hence, it is insisted that the imposition of these tonnage duties upon vessels of the complainants as instruments of commerce, and these specific taxes imposed upon the cargoes of ice being transported in their vessels as subjects of inter-state commerce, are not only authorized by the Constitution and laws of the United States, but are in direct violation of the restrictive provision with reference to the appropriation in aid of canals and the enlargement or extension thereof, contained in the Constitution of the State of Illinois.

For the foregoing reasons, the decree of the Circuit

Court dismissing the bill should be reversed, and the cause remanded to the court below with directions to enter a decree in conformity to the prayer of the bill and for such incidental and supplemental relief as the equities of the case may require.

G. S. ELDREDGE,

Counsel for Appellants.

119543

Supreme Court

OF THE UNITED STATES.

OCTOBER TERM, A. D. 1886.

No. 89.

WM. L HUSE, JAMES L. HUSE, HORATIO G. LOOMIS AND LUTHER LOOMIS,

Appellants,

vs.

JOSEPH O. GLOVER, MARTIN KINGMAN AND BENJAMIN F. SHAW, *Canal Commissioners.*

BRIEF AND ARGUMENT FOR APPELLEES.

GEORGE HUNT,
Attorney-General of the State of Illinois.

SPRINGFIELD, ILL.:
H. W. ROKKER, STATE PRINTER AND BINDER.
1886.

SUPREME COURT

OF THE UNITED STATES.

OCTOBER TERM, A. D. 1886.

No. 89.

HUSE, LOOMIS & CO.

vs.

JOSEPH O. GLOVER *et al.*

BRIEF AND ARGUMENT FOR APPELLEES.

Appellants filed their bill of complaint in the Circuit Court of the United States for the Northern District of Illinois on the 21st day of July, 1881, setting forth that William L. and James L. Huse were citizens of the State of Missouri, and Horatio and Luther Loomis were residents of the State of Illinois. That they were engaged, from 1864 to the time of filing the bill, in cutting ice on the Illinois River, in the State of Illinois, and shipping the same to points outside the State. That they were not aided in

their said business by the construction of the locks and dams hereafter referred to, but that the same were an injury and hindrance to their said business. That in pursuance of the laws of the State of Illinois, appellees were appointed Canal Commissioners and assumed and were exercising the duties of their said offices. That in pursuance thereof they constructed Copperas Creek lock and dam, and a lock and dam at Henry on the Illinois River. That appellants were compelled, in the transportation of ice upon their boats and barges to said points outside the State of Illinois, to pay large sums of money as tolls for passing through said locks. Said Commissioners fixed and collected the rates for passing through the same at a fixed sum per ton, tonnage measurement, of the vessels passing through the said locks. Appellants had paid about the sum of $8,000 as such tolls, and their said bill setting forth the several acts of the General Assembly of the State of Illinois averred that the said acts and the proceedings of the said Commissioners thereunder were contrary to the provisions of article 4 of the ordinance for the government of the territory of the United States northwest of the Ohio River, of July 13th, 1787, which provides that the navigable waters leading into the Mississippi and St. Lawrence Rivers shall be common highways, and forever free, as well to the inhabitants of said territory as to the citizens of the United States, or those of any other State that may be admitted into the confederacy, without any tax imposed or duty therefor. Also contrary to the second paragraph of section 10, article I, of the Constitution of the United States, which prohibits the imposing of tonnage duty by any State without the consent of Congress. Also contrary to the provisions of the act of Congress of May 17, 1796, declaring that all navigable rivers within the Northwestern Territory should be deemed and remain public highways; and contrary to the commerce clause of sec. 8, art. I, of the Constitution.

Said bill averred that the said acts of the Commissioners in collecting said rates, tolls and charges were without authority of law, and prayed for a writ of injunction restraining them from further exacting and collecting from appellants any tolls, tonnage duties or other charges as in said bill set forth.

Defendants filed their demurrer to said bill, and on the 5th day of March, A. D. 1883, the demurrer was sustained and appellants (complainants below) electing to stand by their said bill, the same was dismissed and the case is brought to this Court by appeal.

The several acts of the General Assembly of the State of Illinois, relating to the improvement of the navigation of the Illinois River, are before this Court, and it is urged by appellants that the said acts and the powers conferred thereunder are in conflict with the Constitution of the United States and the laws of Congress.

It is not claimed by the bill in this case that the Canal Commissioners have exercised any power not declared to be in them by the laws of the State of Illinois. The only question in the case is the validity of the laws of the State of Illinois when applied to the matters complained of by the complainants.

The objections raised against the validity of the laws are:

1. That the tolls imposed by the Commissioners, under the laws of the State of Illinois upon vessels passing through the said locks, are in violation of that part of the ordinance for the government of the Northwestern Territory which provides that the navigable waters leading into the Mississippi and St. Lawrence and the carrying places between the same shall be common highways, and forever free to inhabitants of said territory as to the citizens

of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost or duty therefor.

2. In violation of section 10, art. I, of the U. S. constitution, which prohibits any State, without the consent of Congress, from laying any duty on tonnage; and

3. In violation of sec. 8, art. I, of the U. S. constitution, which invests Congress with power to regulate commerce with foreign nations and among the several States and with the Indian tribes.

If the provisions of the laws of the State of Illinois herein complained of are invalid against these complainants by reason of the ordinance and constitutional provisions above referred to, the Court below erred in sustaining the demurrer and the judgment should be reversed. If the said laws of the State of Illinois are not invalid by reason of said ordinance or constitutional provisions, then the demurrer was properly sustained and the judgment should be affirmed.

I.

The first two objections may be considered together, to some extent. The ordinance provides that the navigable waters referred to shall be free, as well to the inhabitants of the Territory as to the citizens of the United States and the States that may be admitted, *without any tax, impost or duty therefor.*

Section 10, Art. I, of the constitution, provides that no State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except, &c., nor lay any duty of tonnage.

Unless the tolls charged by the Canal Commissioners for passing through the locks on the Illinois River were taxes, imposts or

duties for the privilege of navigation of the river, or were imposts or duties on exports or imports, or duty of tonnage, then such tolls were not prohibited by the constitution or ordinance.

It is hardly necessary to state that by the words "tax, imposts, and duty," as here used, are meant a levy upon property or on a privilege for the use of the government, made by virtue of the power of sovereignty. They have no reference to money paid as compensation for something done, and dependent on a property right.

This Court has said:

"If, however, the trustees of the town had a right to compensation for the use of the improved landing, or wharf, which they had made, it is no objection to the ordinance fixing the amount of this compensation that it was measured by the size of the vessel, and that this size was ascertained by the tonnage of each vessel. It is idle, after the decisions we have made, to call this a tax upon tonnage. *Cannon* v. *New Orleans*, 20 Wall. 577; *Packet Co.* v. *Keokuk*, 95 U. S. 80; *Packet Co.* v. *St. Louis*, 100 *id.* 423; *Guy* v. *Baltimore*, *id.* 434."

Packet Co. v. *Catlettsburg*, 105 U. S. 559.

"Still less ground exists for holding that the penalties imposed for a refusal to obey the rules for places of landing, and the orders of the wharf-master on that subject are taxes on tonnage.

"Nor is there any room to question the right of a city or town situated on navigable waters to build and own a wharf suitable for vessels to land at, and to exact reasonable compensation for the facilities thus afforded to vessels by the use of such wharves, and that this is no infringement of the constitutional provisions concerning tonnage taxes and the regulation of commerce."—*Ibid.*

In *Inman Steamship Co.* v. *Tinker*, 94 U. S. 238, it is said: "It may be conceded, also, that foreign steamships and other vessels visiting the ports of a State for business purposes, may be

made liable, by the laws of such State, for all reasonable and proper port charges. This is but a fair return for the benefits received." * * * "The tax imposed is not merely a mode of measuring the compensation to be paid." Clearly implying that the tax, which is for compensation, may be measured by the tonnage of the vessel. "When the charge is for service rendered, it is wholly immaterial whether the amount of compensation is to be measured by the tonnage of the vessel *eo nomine*, or by any other mode of measurement, as courts look to the substance, and not merely to the form of words."

Harbor Commissioners v. *Pashley*, 19 S. C. 315.

The State of Wisconsin authorized the construction of piers, booms and dams in the Chippewa River, a navigable branch of the Mississippi River, in aid of rafting logs down the river. These structures materially interfered with and obstructed the general navigation of the river. Held, however, that in the absence of any action by Congress, the State had full power to enact such laws as it saw fit to enact towards enhancing the usefulness of the river in any particular line of navigation, notwithstanding the general navigation of the river was thereby seriously impeded.

Pound v. *Turck*, 95 U. S. 459.

That case was very like the case at bar in many particulars, viz: both the Illinois and Chippewa rivers are tributaries to the Mississippi River; both are navigable streams; the Chippewa lies wholly in the State of Wisconsin, and the Illinois lies wholly within the State of Illinois; Congress has taken no action in relation to the navigation of either river; the Legislature of Wisconsin authorized the obstruction of the Chippewa River, and the Legislature of Illinois authorized the obstruction of the Illinois

River for its improvement, and in pursuance of such authority obstructions were placed in each river.

There is this difference, however: The obstructions authorized and placed in the Chippewa River were for the benefit of merely one class of people using the river, *i. e.*, persons floating logs down the river; while the structures authorized by the Illinois Legislature to be placed in the Illinois River were for the general benefit of all persons using the river, and not for any particular class of persons, but to increase the general usefulness of the river for all persons navigating it. It is impossible for us to see how the construction of the dams and locks in the Illinois River can be condemned without overruling all that was said in the case of *Pound* v. *Turck*, *supra*.

The dams and locks in the Illinois River are public improvements, not merely to facilitate the use of the river by those engaged in one line of business, but to facilitate its use by all persons in all classes of business.

So far as relates to the charges for passing through the locks, based upon the tonnage, being in conflict with that clause of the Constitution which prohibits the States from imposing tonnage tax, duties or imposts, is concerned, this case must be determined by the decision of this Court in *Packet Co.* v. *Keokuk*, 95 U. S. 80, and the later cases of *Packet Co.* v. *St. Louis*, 100 U. S. 423, *Vicksburg* v. *Tobin*, Id. 430, and *Packet Co.* v. *Catlettsburg*, 105 U. S. 559.

In the case at bar, the charges for passing through the locks, based upon the tonnage of the vessels, were not collected merely

as the exercise of the sovereignty of the State, or for the purposes of revenue, or for the mere privilege of navigating the river or entering a port, but they were charged and collected as an equivalent for the use of the improvements. As said in *Packet Co.* v. *Keokuk*, "the demand is an assertion, not of sovereignty, but of a right of property." And in that case, where wharfage was charged, based upon the tonnage, the charge being for the use of an improved wharf, the Court said:

"It is in no sense a regulation of commerce between the States, nor does it impose duties upon vessels bound to or from one State to another, nor compel entry or clearance in the port of Keokuk; nor is it contrary to the compact contained in the ordinance of 1787, since it levies no tax for the navigation of the river. * * * The record shows that the wharfage charged to these plaintiffs in error was for the use of a wharf built, paved and improved by the city at large expense. So far as the ordinance impo-es and regulates such a charge, it is not obnoxious to the accusation that it is in conflict with the constitution."

The construction of the dams and locks was by authority of the State, and was a public improvement for the general benefit of the people of the State. It was an improvement of one of the public highways of the State, under sanction of the highest authority of the State, and is not in conflict with any of the higher Federal enactments. It may have interfered with the former customs of plaintiffs in error, but this Court has said:

"An abridgment of the rights of those who have been accustomed to use them, unless it comes in conflict with the constitution or a law of the United States, is an affair between the government of the State and its citizens, of which this Court can take no cognizance."

Transportation Co. v. *Chicago*, 99 U. S. 635.

Wilson v. *Black Bird Creek, &c., Co.*, 2 Pet. 250.

"It has long been held that navigable rivers, wholly within a State, are not outside of State jurisdiction, so long as Congress does not interfere."

Transportation Co. v. *Chicago*, *supra*.

A law of the State of Pennsylvania directing the payment of pilot and half-pilotage fees was held not to be in conflict with that provision of the constitution of the United States which prohibits a State from laying any imposts or duties on imports or exports or tonnage.

Cooley v. *Board of Wardens*, 12 How. 299.

Neither is it repugnant to that clause which declares, "The Congress shall have power to regulate commerce with foreign nations and among the several States."—*Ibid.*

The collection of wharfage fees charged by a city for the use of a wharf improved and maintained by the city, and based upon the tonnage of the vessels using the same, is not in violation of any of the provisions of the constitution of the United States, or of the acts of Congress.

Packet Co. v. *St. Louis*, 100 U. S. 423.
Vicksburg v. *Tobin*, 100 U. S. 430.
Packet Co. v. *Keokuk*, 95 U. S. 80.

By the laws of the State of Illinois the Canal Commissioners are given control of the improvements of the navigation of the Illinois River, with power to prescribe rules and regulations in respect to the use of the same and to establish and collect reasonable rates of tolls for the passage of the locks constructed therein. Rev. Stat. 1874, Chap. 19, Sec. 8.

Said Commissioners assumed to exercise said powers, caused locks and dams to be constructed in order to aid navigation upon said river, and fixed rates of toll for the passage of vessels through said locks, the rates being fixed at a certain sum per ton upon the tonnage of the vessel. It has been the policy of the National Government and of the States to improve the transportation facilities of the navigable streams within their borders.

The State of Illinois has improved the usefulness of the Illinois River, and is under a continuous expense to maintain such improvements. As a result of the improvement it may, at times, hinder some individuals in the use of the river for navigation purposes in some specific or isolated transactions.

The State also charges a slight compensation for the use of the improvements, to reimburse itself in whole or in part the necessary expense of maintaining said improvements.

That such a course is not antagonistic to the acts of Congress or the Constitution of the United States is well shown in the opinion of Mr. Justice Harlan, deciding this case in the Court below, and in the cases cited.

The tolls charged are not "*taxes, imposts or duty,*" but are compensation for the use of the improvements furnished. The same reasoning that would support the charging of tolls for the use of a wharf would support the charging of these tolls for the use of the locks. Both charges are compensation for the use of improvements constructed to aid and enhance the facilities furnished by the navigable stream for transportation purposes.

The ordinance does not say that the rivers shall be forever *free*, absolutely, but only that they shall be free without, or free from any *tax*, *duty* or *imposts*.

II.

We further submit to the Court that the ordinance referred to has no restraining effect on the exercise of legislative powers.

This Court said, in *Strader et al.* v. *Graham*, 10 How. 82:

"In the States since formed in the territory, these provisions, so far as they have been preserved, owe their validity and authority to the Constitution of the United States and the constitutions

and laws of the respective States, and not to the authority of the ordinance of the old confederation. As we have already said, it ceased to be in force upon the adoption of the Constitution, and cannot now be the source of jurisdiction of any description in in this Court."

To the same effect are the decisions in *Permoli* v. *First Municipality*, 3 How. 589.

Pollard v. *Hagan*, *Id.* 212.

Ins. Co. v. *Curtenius et al.*, 6 McLean, 209.

It seems, therefore, to follow that all the restrictions upon legislative action must be found in the constitutions of the State and the United States, or the acts of Congress.

III.

The acts referred to do not conflict with the clause of the Constitution delegating to Congress the power "to regulate commerce with foreign nations and among the several States."

This Court has repeatedly held that the force of that clause is simply a delegation of power to Congress, and until Congress acts it has no effect upon matters within a State which may otherwise be regulated by the State. The Illinois laws simply look to the improvement of a highway wholly within her borders. They do not conflict with any laws of Congress relating to the same matter. So long as they do not conflict with national laws their operation and enforcement are matters purely between the State and her citizens.

"If Congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control State legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the Middle and Southern States, we should feel not much difficulty in saying that a State law coming in conflict with such act would be void. But Congress has passed no such act. The repugnancy of the law of Delaware to the constitution is placed entirely on its repugnancy

to the power to regulate commerce with foreign nations and among the several States; a power which has not been so exercised as to affect the question."

Wilson et al. v. *Black Bird Creek Marsh Co., supra.*

"Until the dormant power of the constitution is awakened and made effective by appropriate legislation, the reserved power of the States is plenary, and its exercise in good faith can not be made the subject of review by this Court."

Gilman v. *Phila.*, 3 Wall. 713.

"But until Congress assumes to control the commerce of the river, I take it to be clear law that, as to those streams which lie wholly within the territory of a State, though approachable by other streams from other States, as in this case from the Mississippi River, the State within whose boundaries such river lies may legislate in reference to its commercial use as a public highway, and such has been the uniform practice throughout the country."

Heerman v. *Beef Slough, etc., Co.*, 1 Bis. 334.

Until Congress assumes control of the commerce of a river within a State, the State may authorize the construction and maintenance of piers, dams and booms in the river for logging purposes, even though they may interfere with the navigation of the river.—*Ibid.*

In the absence of specific legislation by Congress the regulation of a navigable stream is left entirely with the State, and the Government can not by bill or information prevent or abate any obstruction.

U. S. v. *Beef Slough Mf'g. Co.*, 1 Bis. 424.

U. S. v. *New Bedford Bridge*, 1 W. & M. 491.

The grant of power to the General Government can not be construed as an absolute prohibition of the exercise of any power over the same subject matter by the States.

License Cases, 5 How. 554.

Houston v. *Moore*, 5 Wheat. 1.

Cooley v. *Warden, etc.*, 12 How. 299.

The courts have frequently held that acts of the State legislatures, authorizing an increase in the usefulness of navigable waters, as the building of dams, wharves, locks, piers, bridges, &c., were not repugnant to the provisions of the Federal Constitution.

"We, therefore, can entertain no doubt that the Legislature may improve, at their discretion, the navigable rivers of the State, and authorize the construction of any works on them which shall not materially obstruct their navigableness. They may build a dam over the Maumee, if it shall be so constructed with a lock, or otherwise, as not materially to obstruct its navigation."

Spooner v. *McConnell et al.*, 1 McLean, 337.

A dam or other fixture on a stream, which is substantially an improvement of navigation, can not be regarded as such an obstruction or impediment as was within the contemplation of the framers of the ordinance of 1787.

Judge Leavitt's separate opinion in *Spooner* v. *McConnell et al.*, 1 McLean, 337-376.

"The river is therefore open and free to all persons, for the purposes of navigation; not as a personal right, but subject to governmental authority. The right to unobstructed navigation of the river is to be regarded a clear and undoubted right, paramount to every other use of the water. It is an inherent, paramount right of the people, but not exclusive of a partial obstruction or inconsiderable detention, by a dam constructed in pursuance of governmental authority for the development of the country, for the accommodation of public necessities, or of commerce, or travel upon land. Partial diminution of the navigability of a stream for these purposes, unless restrained by the superior legislation or authority of the General Government, has been the established power of the States since the formation of the Government."

Woodman v. *Kilbourn Mfg. Co.*, 1 Bissell, 546.

Under legislative authority dams may be built in navigable streams, with locks or sluices, for the accommodation of the whole people.—*Ibid.*

"The value of the property on its banks must be enhanced by excluding the water from the marsh, and the health of the inhabitants probably improved. Measures calculated to produce these objects, provided they do not come into collision with the powers of the General Government, are undoubtedly within those which are reserved to the States. But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this Court can take no cognizance."

Wilson et al. v. *Black Bird Creek Marsh Co.*, 2 Pet. 245.

A State may pass and enforce a law declaring that "no person shall cause, or permit to be floated down Connecticut River, any masts, spars, logs or other timber, unless the same are formed and bound into rafts, and placed under care of a sufficient number of persons to govern and manage the same, so as to prevent damage thereby," even in case the logs come from one State and pass through another, on their way to a third State.

Harrigan v. *Lumber Co.*, 129 Mass. 580.

The Maryland Code, which requires the same rate of license from citizens as from non-residents, does not conflict with the commerce clause of the United States Constitution, or with art. 4, sec. 2. The value of the stock is adopted as a standard merely.

Corson v. *State*, 57 Md. 251.

Riparian owners on a navigable stream can not recover damages for a diversion of the water by the State, or by a corporation acting by authority of the State for the improvement of the navigation.

Black River Imp. Co. v. *LaCrosse Booming, etc., Co.*, 54 Wis. 659.

"The power of a State to improve the navigation of a navigable river, within its limit, between a port of entry and a port of delivery established by a law of Congress on that river, and to pro-

vide for the expense of such improvement by a grant of tolls on a description of vessels passing up and down the river, which, without such improvement could not ordinarily pass, does not conflict with the power of Congress to regulate commerce; and such grant of tolls, therefore, is not void, as repugnant to the Constitution of the United States."

Kellogg v. *Union Co.*, 12 Conn. 7.

A State may improve navigable waters:

Palmer v. *Cuyahoga Co.*, 3 McLean, 226.

Jolly v. *Draw Bridge Co.*, 6 McLean, 237.

Moore v. *Veazie*, 14 How. 568.

Improvement Co. v. *Manson*, 43 Wis. 255.

Cooley's Const. Lim. 591.

Angell on Watercourses, § 561.

And collect tolls for the use of the improvements:

Canal & Navigation Co. v. *Parker*, 29 La. Ann. 430.

Canal Co. v. *Lawrence*, 2 Hun. 163.

Thames Bank v. *Lovell*, 18 Conn. 500.

McReynolds v. *Smallhouse*, 8 Bush, 447.

This Court said in *County of Mobile* v. *Kimball*, 102 U. S. 691.

"The uniformity of commercial regulations, which the grant to Congress was designed to secure against conflicting State provisions, was necessarily intended only for cases where such uniformity is practicable. When, from the nature of the subject or the sphere of its operation, the case is local and limited, special regulations adapted to the immediate locality could only have been contemplated. State action upon such subjects can constitute no interference with the commercial power of Congress, for when that acts the State authority is superseded.

Inaction of Congress upon these subjects of a local nature or operation, unlike its inaction upon matters affecting all the States and requiring uniformity of regulation, *is not to be taken* as a declaration that nothing shall be done with respect to them, but is rather to be deemed a declaration that for the time being, and until it sees fit to act, they may be regulated by State authority. The improvement of harbors, bays and navigable rivers within the States falls within this last category of cases."